SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 431.

CHARLES WINSTON, PETITIONER,

vs.

THE UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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a Transcript of record. Court of appeals, District of Columbia. April term, 1898. No. 804. No. 10, special calendar. Charles Winston, appellant, vs. The United States. Appeal from the supreme court of the District of Columbia. Filed May 9, 1898.

1 In the court of appeals of the District of Columbia.

CHARLES WINSTON, APPELLANT, vs. THE UNITED STATES. } No. 804.

Supreme court of the District of Columbia.

THE UNITED STATES vs. CHARLES WINSTON. } No. 21574. Criminal.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Filed in open court February 10, 1898. J. R. Young, clerk.

In the supreme court of the District of Columbia, holding a criminal term, January term, A. D. 1898.

DISTRICT OF COLUMBIA, *ss:*

The grand jurors of the United States of America in and for the District of Columbia aforesaid upon their oath do present—

That one Charles Winston, late of the District aforesaid, on the thirteenth day of December, in the year of our Lord one thousand eight hundred and ninety-seven, with force and arms, at the District aforesaid, in and upon the body of one Emma Winston, she, the said Emma Winston, in the peace of God and of the said United States of America then and there being, feloniously, wilfully, and of his malice aforethought did make an assault, and that the said Charles Winston a certain pistol, of the value of one dollar, then and there charged with gunpowder and one leaden bullet, which said pistol he, the said Charles Winston, in his right hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought did discharge and shoot off to, against, and upon the said Emma Winston, and that the said Charles Winston, with the leaden bullet aforesaid, out of the pistol aforesaid then and there, by force of the gunpowder aforesaid, by the said Charles Winston discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound her, the said Emma Winston, in and upon the right side of the head of her, the said Emma Winston, giving to her, the said
2 Emma Winston, then and there, with the leaden bullet aforesaid so as aforesaid discharged and shot out of the pistol aforesaid by the said Charles Winston in and upon the right side of the head of her, the said Emma Winston, one mortal wound of the length of one-half

of one inch and of the depth of two inches, of which said mortal wound she, the said Emma Winston, then and there instantly died.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Charles Winston her, the said Emma Winston, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought did kill and murder, against the form of the statute in such case made and provided and against the peace and Government of the said United States.

HENRY E. DAVIS,
Attorney of the United States in and for the District of Columbia.

(Endorsed:) No. 21574. United States vs. Charles Winston. Murder. George N. Nicholson, M. P.; Elizabeth Johnson, William F. Osborn, M. P.; Blake Johnson, Lucy Nichols. A true bill. Wm. B. Gurley, foreman.

Supreme court of the District of Columbia.

SATURDAY, *February 12, 1898.*

The court resumes its session pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

UNITED STATES *vs.* CHARLES WINSTON. } No. 21574. Indicted for murder.

Comes as well the attorney of the United States as the defendant in proper person, in custody of the warden of the jail of the District of Columbia; and thereupon, the defendant being arraigned upon the indictment, he pleads thereto not guilty, and for trial puts himself upon the country, and the attorney of the United States doth the like.

Memorandum.

1898, March 8.—Jury sworn and verdict guilty as indicted.

3 Supreme court of the District of Columbia.

FRIDAY, *March 18, 1898.*

The court resumes its session pursuant to adjournment, Mr. Justice Bradley presiding.

UNITED STATES *vs.* CHARLES WINSTON. } No. 21574. Convicted of murder of Emma Winston.

Come as well the attorney of the United States as the defendant in proper person, in custody of the warden of the jail of the District of Columbia, and by his attorney, C. H. Turner, esq.; whereupon, the defendant's motion for a new trial coming on to be heard, after argument, it is considered by the court that said motion be, and it is hereby, overruled; whereupon the attorney of the United States moves the court to pronounce the sentence of the law in this case, and it is immediately demanded of the defendant what further he has to say why the sentence of the law should not be pronounced against him, and he says nothing except as he has already said; whereupon it is considered by the court that for his

said offence the said defendant be taken by the warden aforesaid to the common jail from whence he came, and there to be kept in close confinement, and that on Wednesday, the twenty-fifth (25th) day of May, A. D. 1898, he be taken to the place prepared for his execution within the walls of the said jail, and then and there, between the hours of ten (10) o'clock antemeridian and one (1) o'clock postmeridian of the same day, he, the said defendant, be hanged by the neck until he be dead; and may God have mercy on his soul. And thereupon the defendant, by his attorney, prays an appeal to the court of appeals of the District of Columbia, which is allowed by the court.

Filed Mar. 19, 1898. J. R. Young, clerk.

In the supreme court of the District of Columbia.

THE UNITED STATES } *vs.* CHARLES WINSTON. } No. 21574. Criminal.

The President of the United States to Henry E. Davis, Attorney of the United States in and for the District of Columbia, greeting:

You are hereby cited and admonished to be and appear at a court of appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the rules of said court, pursuant to an appeal noted in open court of the supreme court of the District of Columbia on the 18th day of March, 1898, wherein Charles Winston is appellant and the U. S. is appellee, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

4 Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 19th day of March, in the year of our Lord one thousand eight hundred and ninety-eight.

[Seal supreme court of the District of Columbia.] JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 19 day of March, 1898.

H. E. DAVIS,
Attorney for Appellee.

Memorandum.

1898, April 2d.—Leave to defendant to prosecute appeal without bond.
Filed May 4, 1898. J. R. Young, clerk.

In the supreme court of the District of Columbia.

THE UNITED STATES OF AMERICA } *vs.* CHARLES WINSTON, DEFENDANT. } Criminal. No. 21574.

Defendant's bill of exceptions.

At the trial of this cause, before the Honorable Andrew C. Bradley and a jury, the prosecution, to maintain the issue on its behalf, introduced as a witness Elizabeth Johnson, who testified as follows:

That she lived at ≠ 521 3rd street southwest and lived there on the 13th day of December last. The defendant occupied an upstairs front

room in the same house with his wife, Emma Winston, now deceased; that on that morning the deceased came in at about 9 o'clock and went upstairs to her room, where the defendant already was; that all was quiet until after 12 o'clock noon, when witness heard a pistol shot, the sound coming from the said upstairs room; that witness then heard the voice of Emma Winston, crying out, "Lord, have mercy," and then witness heard two more shots and then ran out for a policeman.

And, further to maintain the issue on its part joined, the Government introduced Blake Johnson, who testified as follows:

That he is the husband of the last witness, a brother of the deceased, and lives at # 521 3rd street southwest; that on the 12 day of December he heard the defendant say to the deceased, "If those parties tell me that again, I will make you smoke;" and, further, that when the witness and defendant lived together in another house he heard the defendant say to the deceased, "I will kill you this night."

5 And, further to maintain the issue on its part joined, the Government introduced Larkin W. Glazebrook, who testified as follows:

That as deputy coroner he performed an autopsy on the deceased and found thereon three bullet wounds, one about one inch in front of the right ear, surrounded by a powder burn of about an inch in diameter. This bullet passed upward through the lower wall of the skull, penetrated the brain, and lodged just below the upper wall of the skull. The second wound was two and a half inches below the first wound; had a similar powder stain around it. This bullet passed under the skin and muscle upward and lodged about two inches above the right eye. Wound No. 3 was situated just above the lip, about a half inch to the right of the centre of the body. This entrance wound was surrounded by a powder stain of larger diameter. The bullet passed backward and lodged in the posterior pharynx. Wound No. 1 was a fatal wound. No. 2 was not a fatal wound. No. 3 was a dangerous and perhaps fatal wound. Death was caused by acute hemorrhage following gunshot wound of face and brain. On cross-examination witness stated that wound No. 3 would not necessarily produce unconsciousness, though it might do so.

And, further to maintain the issue on its part joined, the Government introduced Lucy Nichols, who testified as follows:

That she was a sister of the deceased, and that about the middle of *the* November, 1897, she heard defendant say to deceased, "God damn you; I will kill you yet;" and, further, defendant said, "When I die you will be dead, too."

And, further to maintain the issue on its part joined, the Government introduced Henrietta Adams, who testified as follows:

That she lived at # 519 3rd street southwest; that on Dec. 13 she was in the 2nd story front room, and at about half past 12 she heard the voice of Emma Winston, crying, "Don't, Charlie, don't; don't, Charlie, don't." Then witness heard shots, followed by a loud cry; then witness heard deceased cry, "Murder, murder." Witness heard 4 shots in all.

And, further to maintain the issue on its part joined, the Government introduced Jeremiah Dee, who testified as follows:

That defendant came to his place on 9th street on the morning of Dec. 13th and got a pistol which he had previously left there.

And, further to maintain the issue on its part joined, the Government introduced George W. Nicholson, who testified as follows:

That he was a policeman, and in the line of his duty was called to the house # 521 3rd street southwest at a little before one o'clock on Dec. 13; that he went upstairs to the front room; found the door fastened and broke it in. The room was quite dark, the curtains were down, and the room was filled with smoke; found the body of Emma Winston on the bed and the defendant in an unconscious condition, with his right
6 arm extended on the bed; a pistol lay about three or four inches from his right hand. He later sent the defendant to a hospital. The woman lay on her side, with her head against the wall and her head covered with blood; much blood on the floor, some on the wall, and the bedding stained with blood. The defendant was badly wounded; blood all over his hair and one eye was closed. Witness identified the pistol, in which there were four empty shells and one loaded shell. Deceased had on but little clothing, an undershirt and skirt, and the pistol when found was three or four feet from the head of deceased and about two feet from her hand.

And, further to maintain the issue on its part joined, the Government introduced Gustave A. Schrader, who testified as follows:

He was a policeman and was detailed Dec. 13th to the Emergency Hospital to guard Charles Winston; that on Dec. 16th Winston, who was badly wounded, rousing up, said, "I want to see my wife; I want to talk with her." Witness said, How is it you are here in the hospital? Defendant replied, "I shot myself." Witness asked defendant what he shot his wife for, and defendant said, "I thought I had killed her." Defendant also said he was jealous of his wife and of one Louis Hickman.

And, further to maintain the issue on its part joined, the Government introduced Margaret T. Dunn, who testified as follows:

That she was a nurse in the hospital and in attendance upon Winston, and while so in attendance heard the defendant say that he had shot his wife because he was jealous of her.

And, further to maintain the issue on its part joined, the Government introduced George A. Juneman, who testified as follows:

He was a surgeon at the Emergency Hospital and dressed Winston's wounds. Winston was suffering from gunshot wound in the right temporal region; ball supposed to be still in left upper jaw. He removed an eye.

And, further to maintain the issue on its part joined, the Government introduced William Vermillion, who testified as follows:

That he was a policeman detailed at the hospital to guard the defendant, and while there asked the defendant why he shot his wife, and defendant replied that he wanted to shoot both her and her lover.

And thereupon the Government rested.

And thereupon the defendant, to maintain the issue on his part joined, took the stand and testified on his own behalf as follows:

That he had been married six years and lived happily with his wife; that he had been in prison for two years for an assault with intent to kill, and in jail 6 months on a plea of simple assault on an indictment of assault with intent to kill, and in jail 3 months for threats to his wife. On the morning of Dec. 13 he came home at 9.30; his wife came in about eleven o'clock; that his wife accused him of running with women and said he had stayed with one the night before. His wife further said,
7 "You had better stay with me, Charlie. Some morning you will come home and find me dead." Defendant sat down in a chair and fell asleep and was wakened by the sound of a pistol shot, which seemed in the room. He asked his wife if she had heard the shot, and she said no, and his wife was then lying on the bed. Defendant approached the bed and leaned over; felt something pressed to his temple; a shot follows, and he fell to the floor wounded; heard thereafter two more shots and then became unconscious. He remembered nothing more for about a week. Witness testified: "I did not shoot my wife. I never told any one I did shoot my wife." On cross-examination witness testified when he went over to the bed his wife was lying on her left side and it was light in the room. The right side of her face was exposed to his view, and that he saw no wounds upon her.

And thereupon the justice, of his own motion, charged the jury as follows:

In the evidence in this case the circumstances are of such character that it will not be necessary for me to instruct you at any length. Therefore, I shall detain you but a very few minutes, and when I shall have concluded the entire responsibility of this case will rest upon you.

The indictment charges the defendant with the murder of his wife by shooting her with a pistol ball fired from a pistol in his hand on the thirteenth day of December, 1897. The indictment charges that this act was committed maliciously, wilfully, and of his malice aforethought, as these indictments ordinarily express it, so that the question for you to determine will be, whether this woman who was killed, as the evidence indicates beyond any doubt or question, by a pistol ball, was killed by her husband, the defendant, who is now on trial, or whether she committed suicide, as it is called, or perpetrated self-murder.

By the testimony it appears that the dead woman, the wife of this man, was a woman of small stature, and that she weighed about 105 pounds. There is no testimony in behalf of the prosecution which tends to show that immediately before the pistol was fired an altercation or struggle occurred between the defendant and his wife. We are entirely unenlightened, except by the testimony of the defendant, as to the circumstances that attended this shooting. It does not appear that there was any struggle, or that there was any altercation, between the defendant and his wife. The defendant does not claim that his wife assaulted him, or that she rendered him seriously angry, or that he fired this shot in the heat of passion. He says that everything was peaceful so far as their relations were concerned, except that his wife was jealous of him; that there was no antecedent struggle, and that he did not fire the fatal shot

at his wife, but that it must have been fired by her own hand; so that there is but one question here. It being undisputed that this woman was killed, that she was killed in that room, and that she was killed by a pistol ball, that question is, Who did it? Was it the act of the
8 defendant or was it the act of the deceased? If you believe from the evidence that the defendant did not fire this fatal shot, or if you believe from the evidence that the deceased woman took her own life, necessarily your verdict must be for the defendant, the verdict of not guilty; but if you believe beyond a reasonable doubt that this woman met her death from a pistol ball fired from a pistol held in the hand of the defendant, and that her death was caused by him, I think that your verdict should be guilty as indicted, for there would be a presumption of malice arising from the fact that her death was accomplished by the firing of a pistol ball by the defendant from a pistol held in his hand; and as there is no evidence that has been adduced which tends to show any palliating or mitigating circumstances, there could be but one reasonable inference from the fact of the shooting, and that would be that the act was committed with malice aforethought.

Malice may be indicated in various ways. It should be indicated by the testimony or by the evidence in some way in order to justify the verdict of guilty of murder. But the use of a pistol in such way as that its use may and does cause death, would be evidence of malice. Evidence of prior threats to take life would be evidence of malice. Evidence tending to show not one wound, but several wounds, tending to show a deliberate purpose to take life or accomplish death, would be evidence of malice. So that if you believe from the evidence, beyond a reasonable doubt, that this defendant killed his wife with a pistol, that he fired into her head three shots from that pistol, you would be justified in reaching the conclusion, in the absence of any circumstances showing mitigation of the crime or anything palliating it, that the defendant is guilty as indicted, and you would be required by your duty to return a verdict of guilty as indicted. The district attorney has adverted to what is called reasonable doubt, and he has explained it sufficiently, I think. Some of you who have performed jury duty before know that it does not mean any kind of doubt that a juror may entertain in his own mind, but that it means a doubt which arises out of all the circumstances in the evidence, and which the jury, after having considered and weighed all the evidence, reasonably entertain. When a jury shall have reached a conclusion amounting to a conviction—that is, when they shall have had their minds convinced by the evidence that a certain conclusion is right—then they are satisfied beyond a reasonable doubt. If you should be satisfied beyond a reasonable doubt that the defendant killed his wife with malice aforethought, you should return a verdict of guilty as indicted.

Now, you have been told, and it is the law since the act of Congress, passed in January, 1897, that a jury is authorized when they shall have reached the conclusion that a defendant on trial is guilty of murder, to qualify their verdict by adding thereto the words "without capital punishment."

Counsel has endeavored to impress upon the jury the fact not only that this right exists, but that it is the duty of the jury to so qualify their

verdict in every given case; that because they have the opportunity of extending mercy, therefore the duty follows the right; that because it is your privilege or opportunity to qualify the verdict by adding the words without capital punishment, it is your duty so to do; but the law was not so intended, gentlemen of the jury. It was intended to serve some useful purpose. There are many shades of circumstances that make up the crime of murder in different cases. In some instances the circumstances might be such as to bring the crime within the definition of murder, and yet those circumstances might not indicate that degree of wantonness, wilfullness, and heinousness that the circumstances in other cases would indicate. I think that it was intended by Congress that in cases where the crime is clearly murder within the definition of the crime of murder, and yet there are circumstances which tend to mitigate the offense, palliating circumstances that tend to show that the crime is not heinous in its character, the jury may add the words "without capital punishment," and the law then makes the penalty imprisonment for life.

That qualification cannot be added unless it be the unanimous conclusion of the the twelve men constituting the jury. I think that it should not be added unless it be in cases that commend themselves to the good judgment of the jury, cases that have palliating circumstances which would seem to justify and require it.

The penalty for the crime of murder has not been abrogated by Congress. The law-making power has seen fit to allow that penalty to remain, and it is only in those cases where the circumstances indicate to the jury that propriety and the necessity, perhaps, or the duty of making such qualification that the jury should add the qualifying words "without capital punishment." In all other cases the law speaks. The jury need not qualify the penalty. It is not their duty to qualify it. It is their right and privilege in a proper case to qualify it. But you are not responsible for the law, nor am I. Neither are you responsible for the facts that you are brought here to try in this case. If the defendant did not commit this crime, he should be returned by your verdict not guilty. If he did commit the crime, then he is responsible for these conditions, not you. Your simple duty is to declare whether he is guilty or not guilty. If guilty, then your verdict should be either guilty as indicted or guilty with the qualification.]

Whereupon the defendant, by his counsel, then and there excepted to that part of said charge which related to the act of Congress approved Jan'y 15th, 1897, entitled "An act to reduce the cases in which the penalty of death may be inflicted," and which portion of the said charge is inclosed in brackets above, and the trial justice noted the said exception upon his minutes before the jury retired to consider of its verdict.

And because the aforesaid exception, made and noted as aforesaid, does not appear of record, the defendant, by his counsel, prays the trial justice to sign, seal, and enrol' this, his bill of exceptions,
10 which is accordingly done, now for then, this 4th day of May, A. D. 1898.

A. C. BRADLEY, *Justice.* [SEAL.]

Supreme court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 16, inclusive, are true copies of originals in case No. 21574, criminal, United States vs. Charles Winston, as the same remains upon the files and records of said court.

[Seal supreme court of the District of Columbia.]

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 7th day of May, A. D. 1898.

JOHN R. YOUNG, *Clerk.*

(Endorsed on cover:) District of Columbia supreme court. No. 804. Charles Winston, appellant, vs. The United States. Court of appeals, District of Columbia. Filed Apr. 9, 1898. Robert Willett, clerk.

11 TUESDAY, *May 17th, A. D. 1898.*

WILLIAM M. STRATHER, APPELLANT,
vs.
THE UNITED STATES; } No. 795.

and

EDWARD SMITH, APPELLANT,
vs.
THE UNITED STATES; } No. 797.

and

CHARLES WINSTON, APPELLANT,
vs.
THE UNITED STATES. } No. 804.

The argument in the above-entitled causes was commenced by Mr. B. T. Roodhouse, attorney for the appellant in No. 795, and was continued by Mr. George Kearney, attorney for the appellant in No. 804, and by Mr. Warder Voorhees, attorney for the appellant in No. 797, and by Messrs. John E. Laskey and D. W. Baker, attorneys for the appellee, and by Mr. Charles H. Turner, attorney for the appellant in No. 804, and was concluded by Mr. Samuel D. Truitt, attorney for the appellant in No. 795.

12 CHARLES WINSTON, APPELLANT,
vs.
THE UNITED STATES. } No. 804.

Mr. Chief Justice Alvey delivered the opinion of the court:

The appellant, Charles Winston, was indicted for the wilful murder of his wife, Emma Winston, by shooting into her head and face three pistol balls. He then attempted to take his own life, by shooting himself, but he failed to inflict a mortal wound. The murder was committed on the

13th of December, 1897, in a room on Third street, where the parties lived. The accused pleaded to the indictment not guilty, and was duly tried by a jury and convicted of murder as indicted, and was sentenced to be hung.

The facts as set out in the bill of exception are few, and show no circumstances whatever of provocation nor of the slightest mitigation of the crime. The only ruling of the court below to which exception was taken by the appellant was to that part of the charge to the jury that related to the application and construction of the act of Congress of January 15, 1897, entitled "An act to reduce the cases in which the penalty of death may be inflicted," and the manner of presenting the consideration of the act to the jury.

It appears that it was contended by counsel for the accused, in their argument to the jury, that it was the duty of the jury to qualify their verdict, as authorized by the act of Congress, in every case of conviction for murder, and to declare the conviction to be "without capital punishment," without reference to the circumstances of the case. But this proposition was not acceded to by the judge in his charge. He said to the jury:

"Now, you have been told, and it is the law since the act of
13 Congress passed in January, 1897, that a jury is authorized, when they shall have reached the conclusion that a defendant on trial is guilty of murder, to qualify their verdict by adding thereto the words 'without capital punishment.'

"Counsel has endeavored to impress upon the jury the fact not only that this right exists, but that it is the duty of the jury to so qualify their verdict in every given case; that because they have the opportunity of extending mercy, therefore the duty follows the right; that because it is your privilege or opportunity to qualify the verdict by adding the words 'without capital punishment,' it is your duty so to do; but the law was not so intended, gentlemen of the jury. It was intended to serve some useful purpose. There are many shades of circumstances that make up the crime of murder in different cases. In some instances the circumstances might be such as to bring the crime within the definition of murder, and yet those circumstances might not indicate that degree of wantonness, wilfulness, and heinousness that the circumstances in other cases would indicate. I think that it was intended by Congress that in cases where the crime is clearly murder within the definition of the crime of murder, and yet there are circumsteness which tend to mitigate the offense, palliating circumstances that tend to show that the crime is not heinous in its character, the jury may add the words 'without capital punishment,' and the law then makes the penalty imprisonment for life.

"That qualification can not be added unless it be the unanimous conclusion of the twelve men constituting the jury. I think that it should not be added unless it be in cases that commend themselves to the good judgment of the jury—cases that have palliating circumstances which would seem to justify and require it.

"The penalty for the crime of murder has not been abrogated by Congress. The lawmaking power has seen fit to allow that penalty to remain, and it is only in those cases where the circumstances indicate to the jury the propriety and the necessity, perhaps, or the duty of making such qualification that the jury should add the qualifying words 'without

capital punishment.' In all other cases the law speaks. The jury need not qualify the penalty. It is not their duty to qualify it. It is their right and privilege in a proper case to qualify it. But you are not responsible for the law, nor am I. Neither are you responsible for the facts that you are brought here to try in this case. If the defendant did not commit this crime, he should be returned by your verdict not guilty. If he did commit the crime, then he is responsible for these conditions, not you. Your simple duty is to declare whether he is guilty or not guilty. If guilty, then your verdict should be either guilty as indicted or guilty with the qualification."

It was to these portions of the charge that exception was taken by the appellant; but it is clearly apparent that the question whether the verdict should be guilty as indicted or guilty "without capital punishment" was fully and clearly submitted to the consideration of the jury on the facts of the case. The jury were left entirely free to adopt the one form of verdict or the other, as their judgment might approve.

We have, in the preceding case of Strather *v.* United States, ante, p. , considered fully the question of the application of the act of Congress of January 15, 1897, and the question as to how far the court can instruct the jury as means of aiding and enlightening them in determining the form of their verdict in reference to the statute. We do not deem it necessary to repeat what we have said in that case. The decision in that case fully covers the question presented in this as to the application, the construction, and the right and power of the court to instruct the jury and the circumstances that should be considered by the jury in determining the question as to the form of their verdict under the act of Congress of January 15, 1897.

We think the exception taken was without sufficient ground to support it, and, therefore, the judgment appealed from must be affirmed; and it is so ordered.

Judgment affirmed.

14 WILLIAM M. STRATHER, APPELLANT, *vs.* THE UNITED STATES; } No. 795.

and

EDWARD SMITH, APPELLANT, *vs.* THE UNITED STATES; } No. 797.

and

CHARLES WINSTON, APPELLANT, *vs.* THE UNITED STATES; } No. 804.

Dissenting opinion by Mr. Justice Shepard.

I am unable to concur with my brothers in their construction of the act of Congress which provides that when an accused person shall be found guilty of murder, "the jury may qualify their verdict by adding, 'without capital punishment.'"

In my opinion, the language of the act is plain, and affords no room for construction—for appeal from its letter to its spirit.

Public policy in respect of the punishment of offenses is a matter within the exclusive control of Congress, and departures therein, whether to be regarded as wise or unwise, must be given effect to as declared.

To my mind, it appears plain that whilst Congress did not abolish capital punishment for the crime of murder, it nevertheless committed the matter of its infliction to the uncontrolled discretion of the jury in each case.

If it had been intended that the exercise of this power of commutation of the death penalty should depend upon the court, or upon the jury, subject to the advice and admonition of the court, I think it would have been expressly so declared.

Whether, in the exercise of an unlimited discretion, juries may or may not make distinctions between criminals, not justified by the conditions of their respective cases, or, in practice, virtually abolish the death penalty, is wholly beside the question. In the exercise of its own undoubted discretion in the premises, Congress has seen proper to commit the power to the jury, and to the jury alone.

15 In construing the statute to mean that the court may, without error, admonish the jury in respect of the grounds upon which they may commute the death penalty by the addition to their verdict, it is not denied that he is compelled also to instruct them that it is their privilege to exercise the power, notwithstanding.

With such instructions as were given in this case, no jury, composed of good citizens, accustomed, as it is their duty, to accept and apply the law as given them in charge by the court, could have extended clemency to any one of these appellants.

After such an admonition, to such a jury, the further information that they might, nevertheless, commute the punishment was but a meaningless formality. It did not give the accused the benefit of the statute.

I cannot accept as sound the argument that the purpose of Congress in this enactment was substantially the same as shown in the legislation of the States, whereby the offense of murder has been divided into two degrees—murder of the first and murder of the second degree.

On the contrary, it seems to me that there is a substantial difference of purpose. Under the State statutes referred to, murder of the first degree consists of homicide committed in the perpetration of offenses like rape, robbery, arson, and burglary, or by poison, starvation, torture, and so forth, showing express malice. All murder not included in the definition of the first is murder of the second degree.

In the enforcement of those statutes the courts are required to declare the law to the jury in application to the facts. Where the evidence shows plainly that the accused, if guilty at all, is guilty of murder of the first degree and nothing less, it is the duty of the court to withhold from the jury the privilege of returning a verdict of guilty of murder of the second degree. The court is not required to submit the question of the degree of guilt to the jury, regardless of the evidence, as under the act of Congress it is compelled to extend to them the privilege of commuting the death penalty.

If the purposes of the two sets of statutes are the same, it would be more reasonable to hold that, under the act of Congress, the right to commute the death penalty should not be accorded to the jury at all, unless the evidence should discover something tending to warrant the exercise of clemency.

For the reasons given, I am of the opinion that the judgment in each case should be reversed.

16 Court of appeals of the District of Columbia. April term, 1898.

CHARLES WINSTON, APPELLANT, vs. THE UNITED STATES. } No. 804.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the district of Columbia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said supreme court, in this cause, be, and the same is hereby, affirmed.

Per Mr. Chief Justice Alvey, June 7, 1898.

Dissenting, Mr. Justice Shepard.

(Indorsed:) Court of appeals of the District of Columbia. April term, 1898. No. 804. Judgment. Court of appeals, District of Columbia. Filed Jun' 7, 1898. Robert Willett, clerk.

17 Court of appeals of the District of Columbia.

I, Robert Willett, clerk of the court of appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 16, inclusive, contain a true copy of the transcript of record and proceedings of said court of appeals in the case of Charles Winston, appellant, vs. The United States, No. 804, April term, 189 , as the same remain upon the files and records of said court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said court of appeals, at the city of Washington, this 8th day of October, A. D. 1898.

[SEAL.] ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

18 (Indorsement on cover:) Case No. 17016. District of Columbia court of appeals. Term No., 431. Charles Winston, petitioner, vs. The United States. Filed October 11, 1898.

15585

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 431.

CHARLES WINSTON, PETITIONER,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

GEORGE KEARNEY,
Attorney for Petitioner.

CHARLES H. TURNER,
Of Counsel.

1 In the Supreme Court of the United States.

In the matter of the application of Charles Winston for a writ of certiorari in the case of Chas. Winston vs. The United States. In the court of appeals of the District of Columbia.

Petition for writ.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Chas. Winston, respectfully shows and *and* gives your honorable court to be informed, as follows:

1st. That he is a citizen of the United States and a resident of the District of Columbia.

2nd. That your petitioner was indicted in the supreme court of the District of Columbia at the January term thereof, A. D. 1898, for the murder of his wife, Emma Winston. (See record hereto annexed.) To this indictment, on Feb. 12, 1898, he pleaded "not guilty." Thereupon was issue joined, and he was put upon his trial in the court aforesaid on March 8, 1898.

2 3. That upon the said date there was in full force and effect in the said District of Columbia a certain statute, to wit, the statute of Jan. 15, 1897, entitled "An act to reduce the cases in which the death penalty may be inflicted," a portion of which act being in the words following: "That in all cases where the accused is found guilty of the crime of murder or of rape under sections 5339 and 5345, Rev. Statutes, the jury may qualify their verdict by adding thereto, 'without capital punishment,' and whenever the jury shall return a verdict as aforesaid the person convicted shall be sentenced to imprisonment for life." (29 Stat. at Large, 487, sec. 1.)

4. That the presiding justice (the Hon. Andrew C. Bradley) at the conclusion of the testimony, on his own motion, charged the jury as follows:

3 In the evidence in this case the circumstances are of such character that it will not be necessary for me to instruct you at any length. Therefore I shall detain you but a very few minutes, and when I shall have concluded the entire responsibility of this case will rest with you.

The indictment charges the defendant with the murder of his wife, by shooting her with a pistol ball fired from a pistol in his hand, on the thirteenth day of December, 1897. The indictment charges that this act was committed maliciously, willfully, and of his mal*ice* aforethought, as these indictments ordinarily express it. So that the question for you to determine will be whether this woman, who was killed, as the evidence indicate' beyond any doubt or question, by a pistol ball, was killed by her husband, the defendant, who is now on trial, or whether she committed suicide, as it is called, or perpetrated self-murder.

By the testimony it appears that the dead woman, the wife of this man, was a woman of small statu*re* and that she weighed about 150 pounds. There is no testimony in behalf of the defendant nor is there any in behalf of the prosecution which tends to show that immediately

before the pistol was fired an altercation or struggle occur'ed between the defendant and his wife. We are entirely unenlightened except by the testimony of the defendant as to the ciacumstances that attended this shooting.

It is not claimed *plain* that there was any struggle or that there was any altercation between the defendant and his wife. The defendant does not claim that his wife assaulted him or that she rendered him seriously angry, or that he fired this shot in the heat of passion. He says that every thing was peaseful/ so far as their relations were
4 concerned, except that his wife was jealous of him, that there was no antecedent struggle, and that he did not fire the fatal shot at his wife, but that it must have been fired by her own hand. So that there is but one question here. It being undisputed that this woman was killed, that she was killed in that room, and that she was killed by a pistol ball, that question is, who did it? Was it the act of the defendant, or was it the act of the deceased? If yo' believe from the evidence that the defendant did not not fire this fatal shot, or if you believe from the evidence that the deceased woman took her own life, your verdict necessarily must be for the defendant—the verdict of not guilty. But if you believe, beyond a reasonable doubt, that this woman met her death from a pistol ball fired from a pistol held in the hand of the defendant, and that her death was caused by him, I think your verdict shou'd be guilty as indicted, for there would be a presumption of mal*a*ce arising from the fact that her death was accomp*r*ished by the firing of a pistol ball by the defendant from a pistol held in his hand; and as there is no evidence that has been adduced which tends to show any pal'iating or mitigating circumstances there could be but one reasonable inference from the fact of the shooting, and that would be that it was committed with mal*a*ce aforethought.

Mal*a*ce may be indicated in various ways. It should be indicated b*u*y the testimony, or by the evidence in some way, in order to justify the verdict of guilty of murder. But the use of a pistol in such a was as that its use may and does cause death would be evidence of mal*a*ce. Evidence of prior threats to take life would be evidence of mal*a*ce. Evidence tending to show not one wound, but several wounds, tending to show a deliberate purpose to take life or accomplish death wou'd be evidence of mal ce. So that if you believe from the evidenc', beyond a reasonable doubt, that this defendant killed his wife with a pistol ball, that he fired into her head three shots from that pistol, you would
5 be justified in reaching the conclusion, in the absence of any circumstances showing mitigation of the crime or anything pal'iating it, that the defendant is guilty as indicted, and you would be required by your duty to return a verdict of guilty as indicted. The district attorney has adverted to what is called reasonable doubt, and he has explained it sufficiently, I think. Som' of y'u who have performed jury duty before know that it does not mean any kind of doubt that a jo*u*or may entertain in his own mind, but it means a doubt which ar*i*ses out of all the circumstances in the evidence, and which the jury, after having considered and weighed all the circumstances, reasonably entertain. When a jury shall have ar'ived at a conclusion amounting to a conviction, that is when they shall have had their minds convinced by the evidence that

a certain conclusion is right, then they are satisfied beyond a reasonable doubt. If you should be satisfied beyond a reasonable doubt that the defendant killed his wife with malice aforethought, you should return a verdict of guilty as indicated.

Now you have been told, and it is the law since the act of Congress passed in January, 1897, that the jury is authorized when they shall have arrived at the conclusion that a defendant on trial is guilty of murder, to qualify their verdict by adding thereto the words "Without capital punishment."

Counsel has endeavored to impress upon the jury the fact not only that this right exists, but that it is the duty of the jury to so qualify their verdict in any given case. Because they have the opportunity of extending mercy, it is argued that, therefore, the duty follows the right. Because it is your privilege or opportunity to qualify the verdict by adding without capital punishment, it is your duty so to do. But the law was not so intended, gentlemen of the jury. It was intended to serve some useful purpose. There are many shades of circumstances that go to make up the crime of murder in different cases. In some instances the circumstances might be such as to bring the crime within the definition
6 of murder, and yet those circumstances might not indicate that degree of wanton'ess, wilfulness, and heinousness that other circumstances would indicate, but yet would bring the crime no less within the definition of murder. I think it was intended by Congress that in cases where the crime is clearly murder within the definition of the law of murder and yet there are circumstances which tend to mitigate the offence, pal'iating circumstances that tend to show that the crime is not so heinous in its character, the jury may add the words "without capital punishment," and the law then makes the penalty imprisonment for life.

That qualification can not be added unles' it be the unanimous conclusion of the twelve men constituting the jury. I think that it should not be added unless it be in cases that commend themselves to the good judgment of the jury, cases that have pal'iating circumstances which would seem to justify and require it.

The penalty for the crime of murder has not been abrogated by Congress. The lawmaking power has seen fit to al'ow that penalty to remain; and it is only in those cases where the circumstances indicate to the jury the propriety and the necessity, perhaps, or the duty of making such qualifications that the jury should add the qualifying words, "without capital punishment." In all other cases the law speaks. The jury need not qualify the law. It is not their duty to so qualify it. It is their right and privilege in a proper case to so qualify it.

But you are not responsible for the law; nor am I. Neither are you responsible for the facts that you are brought here to try this case. If the defendant did not commit this crime he should be returned by your verdict not guilty. If he did commit the crime, then he is responsible for these conditions, not you. Your simple duty is to declare whether he is guilty or not guilty. If guilty, then your verdict should be either guilty as indicted or guilty with the qualification.

7 To which charge your petitioner, by his counsel, then and there excepted, especially to that part of said charge which related to the act of Cong. approved Jan. 15, 1897, above cited, and the trial justice

noted the said exception upon his minutes before the jury retired to consider of its verdict.

5. That thereupon the jury retired, and later returned and declared their verdict to be "Guilty as indicted," and that thereupon your petitioner was remanded to jail, and on the 18th day of March, 1898, a motion for a new trial was overruled and your petitioner was sentenced to be hanged on the 25th day of May, 1898. And that thereupon your petitioner prosecuted an appeal in court of appeals of the District of Columbia.

6. That the appeal of your petitioner from the judgment above cited was heard in the court of appeals of the District of Columbia at the May term thereof, and said judgment was affirmed in an opinion rendered by Mr. Ch. Justice Alvey, as appears in the record accompanying this
8 petition, from which opinion Mr. Justice Shepherd dissented, as also appears in the record above cited.

7. That your petitioner was respited by the President from the sentence imposed from May 25, 1898, until June 25, 1898, and from June 25, 1898, until Jan., 1899.

9 *Points.*

The error complained of by petitioner is in the construction of the court placed upon the act of Congress of Jan. 15, 1897, entitled "An act to reduce the cases in which the death penalty may be inflicted." This act provides in the most explicit terms "that in all cases where the accused is found guilty of murder * * * the jury may qualify their verdict by adding thereto 'without capital punishment.'" There is here no ambiguity of language and no excuse to go beyond the plain words of the statute to gather the meaning of the legislators. There being no ambiguity the accused was entitled to the full strength of the letter of the law. On this point we beg to quote from Sutherland on Stat. Const., sec. 247: "If the words of the statute are precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do in such cases best declare the intention of the legislature." And again, we find in Potter's Dwarris on Statutes the following, p. 245, note 35: "A further rule is that an offender who is protected by its letter can not be deprived of its benefit on the ground that his case is not within its spirit." Citing
10 United States v. Ragsdale, 1 Hemp., 497. The words of the statute of Jan. 15, 1897, are "precise and unambiguous;" it applies to all cases of murder. It was not competent for the trial court to limit its application to a certain class of cases, to wit, cases with mitigating circumstances. This action of the court was plainly contrary to the spirit of our criminal jurisprudence, and in violation of the well-settled rule of construction of penal statutes. Especial attention is invited to Endlich Interpretation of Statutes, sections 4 and 7.

"The legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction." (Sec. 4.) And again, "When the words admit of but one meaning a court is not at liberty to speculate on the intention of the legislature or to construe and act according to its own notions of what ought to have been

enacted. * * * The question for him is not what the legislature meant, but what the language means." (Sec. 7.)

In any event the accused was entitled to the most favorable construction of the words of the statute. See Sutherland Stat. Const., sec. 347, 349; Endlich Interpretation Stat., sec. 329; Bishop Stat. Crimes, sections 196 and 227.

11 Hence it is manifest that the trial court erred in attempting to write into the law, i. e., the act of Jan. 15, 1897, a limitation which the plain words of the act in their ordinary meaning did not contain.

2. Assuming, however, that there was any occasion for the court to go beyond the letter of the statute of Jan. 15, 1897, to ascertain its meaning, we most respectfully submit that the court misconceived the scope and spirit of the said act.

This act was passed by the 54th Congress, and to elucidate the meaning placed upon it by that body we quote the following:

12 Mr. CURTIS. "In the Fifty-third Congress a bill was introduced defining murder in the first and second degrees. The Committee on the Judiciary unanimously reported it, and it passed the House of Representatives. While pending in the Senate, the Attorney-General of the United States, Mr. Olney, was of the opinion that murder should not be defined as of the first and second degrees, and members of the Committee on the Judiciary of the Senate were also of the opinion that as the practice of the Federal courts is that of the common law, it was not advisable to introduce the question of definition into the statutes, and that it was preferable to repeal such sections prescribing capital punishment for offenses which the committee thought it desirable to have abolished." * * * "In respect to the crimes of murder and rape it preserves the death penalty, but it permits, as is provided in the State of Louisiana in express terms, and in many other States in principle, that the jury may, in bringing in their verdict, decide whether capital punishment shall be inflicted or not, by allowing the jury to add the words 'without capital punishment' to their verdict. If that clause is added, the court will sentence the accused to imprisonment for life, and if there is no recommendation, then the death penalty will be inflicted, as now provided for those crimes."

Mr. SAYERS. "I should like to know from the gentleman (Mr. Curtis) whether, where robbery is attempted and death follows, this bill modifies the punishment inflicted?"

Mr. CURTIS: "The bill allows the reduction of the penalty in every case. The jury decide in each case." * * *

"I am sorry, I frankly say, that this is not a bill totally abolishing capital punishment." (Congressional Record, 54th Congress, 1st session, vol. 28, pt. 3, pp. 2649–2650.)

13 3. It thus appears that this statute was adopted as a law of the United States from the State of Louisiana (see Wolff's Louisiana Rev. Laws, 1897, sec. 1000), and hence the trial court should have given it the same construction that it receives in that State. (Potter's Dwarris Statutes, p. 42, note 3; Cathcart v. Robinson, 5 Peters, 263; Allen v. St. Louis Bank, 120 U. S., 20, 34.)

The practice in Louisiana seems to be to leave absolutely to the jury the discretion of affixing or withholding the qualifying words in their

verdict. See State v. Melvin, 11 La. Annual, 535, 537, in which the following words appear: "The qualification of a verdict should be left where the law has left it, to the sound discretion of the jury upon the facts of the case, guided by a sense of their solemn responsibility, which is to do their whole duty to the State as well as to the accused."

14 4. Statutes similar to the act of Jan. 15, 1897, have been enacted in several of the States, and in those States the practice seems to be to leave wholly to the discretion of the jury the fixing of the punishment. The trial justices in these several States appear to content themselves with a mere naked exposition of the law.

Spain vs. State, 59 Mississippi, 19, 24 (1881):

"The judgment must be reversed because of the second instruction given at the instance of the State. It limits and qualifies the right of the jury to fix the punishment at imprisonment for life, whereas the law confers on the jury this right without qualification or restriction. The right of the jury to fix the punishment, as indicated, is without any condition. The most atrocious crime committed under the most aggravating circumstances may be punished by imprisonment for life instead of by death, if the jury so determines by its verdict. The law demands a jury willing to be the instrument of visiting the penalty of death and confers on such a jury the unconditional right to fix the punishment at imprisonment for life. It was erroneous to instruct the jury that its right was dependent on any state of the evidence or on any view it might take of it." (See also Walton v. State, 57 Miss., 533.)

Hill vs. State, 72 Ga., 131:

"The code leaves it in the discretion of the jury as to whether they will recommend imprisonment for life in the penitentiary of a person convicted of murder; they are not limited or circumscribed in any respect whatever; nor does the law prescribe any rule by which the jury may or ought to exercise this discretion. Therefore, a charge that the jury, in considering the question of recommendation of mercy, should not be governed by their sympathies, but by their judgments, approved by the evidence in the case and the law applicable to it, was error."

Marshall vs. State, 74 Ga., 26, 31:

"They were instructed that if they found the defendant guilty of murder, they had the right to recommend that he be punished by confinement in the penitentiary for life, and if they made that recommendation, that had to be the penalty. In other words, they fixed the penalty, or they had the right to refuse the recommendation, as they saw proper. If they failed to recommend, the prisoner might be hung, or if they recommended that he be imprisoned in the penitentiary for life, then that was the penalty fixed by law; that was a matter entirely with them, upon which the court gave them no instruction, as he had no right to do so; that it was a matter of which they had absolute control."

15 Inman vs. State, 72 Ga., 269, 280:

"In regard to the right of the jury to recommend imprisonment for life, the better practice is for the court to call the attention of the jury to the law and merely state to them that, if they think proper, they may, in addition to the verdict of guilty, recommend that defendant be imprisoned in the penitentiary for life."

(See Doran v. State, 7 Texas Ct. App., 385; Myers v. State, 8 Texas Ct. App., 321.)

In California it seems a contrary view was taken for a time, but the older cases were overruled in People v. Leary, 105 Cal., 486, 495, in which the following appears:

"The legislature having confided to the discretion of the jury the fixing of the penalty of death or confinement in the State prison for life upon a verdict of guilty of murder in the first degree, the discretion of the jury in that matter is absolute."

Indeed, the earlier case of People v. Bawden sharply criticises the action of a trial judge in instructing the jury upon this point. (See People v. Bawden, 90 Cal., 195, 198.)

The only text writer that we find who has touched the subject at all is McClain, who, in sec. 363 of his work on criminal law, says:

"By some statutes a discretion is left to the jury in determining the punishment, * * * and the court should not in any way interfere by instruction with the discretion of the jury."

16 5. Several murder cases have been tried in different United States courts under the act of Jan. 15, 1897, and while these cases are not reported, we append extracts from the charges of the trial justices taken from stenographic notes.

Mr. Justice Bryant, in the eastern district of Texas, at the April term, 1898, in the case of George De Laughter, charged the jury as follows: "In that event you will find the defendant guilty, as charged in this indictment, and if you see proper so to do, add to your verdict, 'without capital punishment.'" In the case of J. W. Lewis, tried at the same term of the court, the charge contained the following: "A killing, upon either express or implied malice, in this court is murder, and, upon conviction, punishable by death, unless the jury in their discretion see proper to add to their verdict 'without capital punishment;' in that state of the case it is penitentiary for life."

The presiding justice in the case of United States v. Bram, tried in U. S. court at Boston, used the following language: "Gentlemen, under the law of the United States, as it now stands, your verdict may be either guilty, not guilty, or guilty, without capital punishment."

17 6. In view of the foregoing it would appear that if there existed any reason to attempt to construe a law so plain in its letter as the act of Jan. 15, 1897 (which we deny), that the trial justice in his construction misconceived the spirit of that act. It plainly was not the intention of Congress to divide the crime of murder into two degrees. Therefore, to limit the application of this act to "cases that have palliating circumstances" was beyond the power of the trial judge and was manifest error.

18 The presiding justice also charged the jury in this case (Record, p. 8, line 11): "There is no evidence that has been adduced which tends to show any palliating or mitigating circumstances." This, we submit, is plain error. Indeed, to justify the judge's charge that a qualified verdict can not be given, unless there are mitigating circumstances, we must assume the theory that the statute created degrees or classes of murder; that it divided the offence into cases without mitigating circumstances, and fixed the death penalty as punishment, and into cases with mitigating circumstances with life imprisonment as punishment. If this theory be correct, then the judge's charge that there were no mitigating circumstances in this case eliminated from the consideration of the

jury that degree of murder the punishment for which is life imprisoment, and made it obligatory upon them to impose the death penalty.

Similar to this is the case of Hoyt v. Utah, 110 U. S., 574, 582, where under a statute it is for the jury to say whether the facts make a case of murder in the first or second degree, the court told the jury: "That an atrocious and dastardly murder has been committed by some person is apparent." This court said that the instruction was naturally regarded by them as an instruction that the offence, by whomsoever committed, was murder in the first degree.

19 7. The jury in this case were plainly told that they should only qualify their verdict under "palliating circumstances which would seem to justify and require it," and they had been told with equal directness that "no evidence has been adduced which tends to show any palliating or mitigating circumstances."

This, it is submitted, is a virtual, and indeed emphatic, direction to the jury not to add the qualifying words to their verdict in this case.

It is a virtual denial of this statute to this accused, and leaves him in no better plight than a refusal to acquaint the jury with the provisions of the statute of January 15, 1897, would have done, which would have been palpable error. (See Colton v. Utah, 130 U. S., 83.)

The syllabus of which case is as follows:

"In a conviction for murder in the first degree in Utah: Held, that the court erred in not directing the attention of the jury to the provision of the penal code as to their right to recommend imprisonment for life, at hard labor, in the penitentiary in place of the punishment by death.

"By such action the court deprived the prisoner of a substantial right."

20 And, finally, it is respectfully submitted that the charge of the trial judge, taken in its entirety, was a direction to the jury not to add the qualifying words to their verdict in this case. It is nowhere denied that, in any view of the law, to the jury must be left at last the right to make up their verdict on this, as well as every other part of the case; and this, we apprehend, is equally true, even if it be considered proper for the trial justice to advise and instruct them upon this point. The jury must finally be left untrammeled to add or withhold the qualifying words as they see fit. Such necessary freedom of action, we contend, was denied the jury in this case. We quote from the dissenting opinion of Mr. Justice Shepard in this case: "With such instructions as were given in this case, no jury composed of good citizens, accustomed, as it is their duty, to accept and apply the law as given them in charge by the court, could have extended clemency to any one of these appellants. * * * It did not give the accused the benefit of the statute."

21 8. Wherefore your petitioner, being advised by his counsel that the said charge of the trial justice above cited was a misconstruction of the act of Jan. 15, 1897, and that by reason of said construction he was deprived of a substantial right, prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the court of appeals of the District of Columbia, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said court

of appeals of the District of Columbia in the said case therein, entitled Charles Winston, appellant, versus The United States, appellee, No. 804,
to the end that the said case may be reviewed and determined
22 by this court, as provided by the act of Congress of March 3d, 1897, entitled an act to authorize the Supreme Court of the United States to issue writs of certiorari to the court of appeals of the District of Columbia in the same cases and manner that it may do in respect of the circuit court of appeals, and that your petitioner may have such other and further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said judgment of the court of appeals of the District of Columbia, and every part thereof, may be reversed by this honorable court.

And your petitioner will ever pray.

GEO. KEARNEY,
Attorney for Petitioner.
CHAS. H. TURNER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 432.

WILLIAM M. STRATHER, PETITIONER,

vs.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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a Transcript of record. Court of appeals, District of Columbia, April term, 1898. No. 795. No. 8, special calender. William M. Strather, appellant, vs. The United States. Appeal from the supreme court of the District of Columbia. Filed April 25, 1898.

1 In the court of appeals of the District of Columbia.

WILLIAM M. STRATHER, APPELLANT, vs. THE UNITED STATES. } No. 795.

Supreme court of the District of Columbia.

THE UNITED STATES vs. WILLIAM M. STRATHER. } No. 21474. Criminal.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Filed in open court December 31, 1897.

In the supreme court of the District Columbia, holding a criminal term, October term, A. D. 1897.

DISTRICT OF COLUMBIA, *ss:*

The grand jurors of the United States of America in and for the District of Columbia aforesaid upon their oath do present:

That one William M. Strather, late of the District aforesaid, on the fifteenth day of October, in the year of our Lord one thousand eight hundred and ninety-seven, with force and arms, at and in the District aforesaid, in and upon the body of one Rosa Talbert, she, the said Rosa Talbert, in the peace of God and of the said United States then and there being, feloniously, wilfully, and of his malice aforethought did make an assault, and that the said William M. Strather, with a certain hatchet of the value of one dollar, which said hatchet he, the said William M. Strather, in his right hand then and there had and held, the said Rosa Talbert, in and upon the head of her, the said Rosa Talbert, then and there feloniously, wilfully, and of his malice aforethought did strike, thrust, and penetrate, giving to her, the said Rosa Talbert, then and there, by such striking, thrusting, and penetrating aforesaid, with the hatchet aforesaid, in and upon the head of her, the said Rosa Talbert, one mortal wound of the length of five inches and of the depth of three inches, of which said mortal wound she, the said Rosa Talbert, then and there instantly died.

2 And so the grand jurors aforesaid upon their oath aforesaid do say that the said William M. Strather her, the said Rosa Talbert,

in the manner and by the means aforesaid, feloniously, wilfully, and of malice aforethought did kill and murder, against the form of the statute in such case made and provided and against the peace and Government of the United States.

SECOND COUNT.

And the grand jurors aforesaid upon their oath aforesaid do further present:

That the said William M. Strather, late of the District aforesaid, on the fifteenth day of October, in the year of our Lord one thousand eight hundred and ninety-seven, with force and arms, at and in the District aforesaid, in and upon the body of one Rosa Talbert, she, the said Rosa Talbert, in the peace of God and of the said United States then and there being, feloniously, wilfully, and of his malice aforethought did make an assault, and that the said William M. Strather, with a certain hatchet of the value of one dollar, which said hatchet he, the said William M. Strather, in his right hand then and there had and held, the said Rosa Talbert, in and upon the head of her, the said Rosa Talbert, then and there feloniously, wilfully, and of his malice aforethought did strike and beat, giving to her, the said Rosa Talbert, then and there, by such striking and beating aforesaid, with the hatchet aforesaid, in and upon the head of her, the said Rosa Talbert, divers mortal fractures, bruises, and contusions, of which said divers mortal fractures, bruises, and contusions she, the said Rosa Talbert, then and there instantly died.

And so the grand jurors aforesaid upon their oath aforesaid do say that the said William M. Strather her, the said Rosa Talbert, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought did kill and murder, against the form of the statute in such case made and provided and against the peace and Government of the said United States.

HENRY E. DAVIS,
Attorney of the United States in and for the said District of Columbia.

(Endorsed:) No. 21474. United States vs. William M. Strather. Murder. Witnesses: S. L. Cooper, M. P.; James H. Lutton, M. P.; Joseph C. Baylor. A true bill. Richard T. Fussell, foreman.

Supreme court of the District of Columbia.

TUESDAY, *Jan'y 11, 1898.*

The court resumes its session pursuant to adjournment, Mr. Justice Bradley presiding.

* * * * * * *

3 UNITED STATES *vs.* WILLIAM M. STRATHER. } No. 21474. Indicted for murder of Rosa Talbert.

Come as well the attorney of the United States as the defendant in proper person, in custody of the warden of the jail of the District of Columbia; and thereupon the defendant being arraigned upon the indictment, he pleads thereto not guilty and for trial puts himself upon the country, and the attorney of the United States doth the like.

Memorandum.

February 7, 1898.—Jury sworn and respited from day to day until—
February 10, 1898.—Verdict, guilty as indicted.

Supreme court of the District of Columbia.

FRIDAY, *March 4, 1898.*

The court resumes its session pursuant to adjournment, Mr. Justice Bradley presiding.

UNITED STATES *vs.* WILLIAM M. STRATHER. } No. 21474. Convicted of murder of Rosa Talbert.

Come as well the attorney of the United States as the defendant in proper person, in custody of the warden of the jail of the District of Columbia, and by his attorneys, Messrs. S. D. Truitt and Benjamin T. Roodhouse; whereupon, the defendant's motion for a new trial coming on to be heard, after argument, it is considered by the court that said motion be, and it is hereby, overruled; whereupon the attorney of the United States moves the court to pronounce the sentence of the law in this case, and it is immediately demanded of the defendant what further he has to say why the sentence of the law should not be pronounced against him, and he says nothing except as he has already said; whereupon it is considered by the court that for his said offense the said defendant be taken by the warden aforesaid to the common jail, from whence he came, and there to be kept in close confinement, and that on Thursday, the fifth day of May, A. D. 1898, he be taken to the place prepared for his execution within the walls of the said jail, and then and there, between the hours of ten (10) o'clock antemeridian and one (1) o'clock postmeridian of the same day, he, the said defendant, be hanged by the neck until he be dead, and may God have mercy on his soul; and thereupon the defendant, by his attorneys, pray an appeal to the court of appeals of the District of Columbia, which is allowed by the court.

4 Filed Mar. 5, 1898. J. R. Young, clerk.

In the supreme court of the District of Columbia.

THE UNITED STATES *vs.* WILLIAM M. STRATHER. } No. 21474. Criminal.

The President of the United States to Henry E. Davis, Attorney of the United States in and for the District of Columbia, greeting:

You are hereby cited and admonished to be and appear at a court of appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal noted in the supreme court of the District of Columbia on the 4th day of March, 1898, wherein William M. Strather is appellant and the U. S. is appellee, to show cause, if any there be, why the judgment

rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 5th day of March, in the year of our Lord one thousand eight hundred and ninety-eight.

JOHN R. YOUNG, *Clerk.*

[Seal supreme court of the District of Columbia.]

Service of the above citation accepted this 5th day of March, 1898.

HENRY E. DAVIS,
Attorney for Appellee.

Memorandum.

March 24, 1898.—Leave to defendant to prosecute appeal without bond.

Filed April 20, 1898.

In the supreme court of the District of Columbia.

THE UNITED STATES OF AMERICA }
vs. } Criminal. No. 21474.
WILLIAM H. STRATHER. }

Defendant's bill of exceptions.

At the trial of this cause, before the Honorable Andrew C. Bradley and a jury, the prosecution offered and gave evidence tending to show that the defendant and Rosa Talbert had been and at the time of the homicide were living together as man and wife; that the woman was the wife of another man; that she was employed as a domestic in a house of ill-fame and the defendant was a vender of newspapers; that they usually spent their nights together at a room rented by the defendant; that for several nights prior to the homicide the woman failed to join him; that he threatened to kill her; that the night of the homicide they occupied the same room, and the next morning very early the occupants of the lower rooms, hearing an unusual noise in defendant's room, and having knocked at his door and failed to get an explanation, summoned the police; that upon entering defendant's room the police officer asked him what was the matter, and he replied that he reckoned it was murder; that the woman was found lying crosswise the bed, dead; that the floor was tracked with blood by the feet of the defendant, whose stockings were saturated with blood, and a large pool of blood was on the floor near the bed; that there were six wounds on the head of the dead woman, four of which went into the brain substance and were absolutely fatal; that they were probably made by a hatchet, such as the one produced, which, blood-stained, was found in the room; that two of these wounds were on the left side of the face, a half inch apart, the upper one an inch deep and one and one-half inches long, cutting the temporal artery and into the bones of the joint; the lower one was one inch long and one inch deep, fracturing the superior maxilla; that another wound was

in the forehead, across over the eyebrows, four and one-half inches long and two and one-half inches deep—a compound, comminuted depressed fracture of the skull; another wound was on the right side of the head, just above the ear, three inches long and one and a half inches deep, fracturing the temporal bone; another wound extended across the middle of the right ear, cutting it in two; it was a wide, gaping wound, three inches long, two and one-half inches deep, mashing in that side of the face and skull, and another wound was in the cheek, one and a half inches long and one inch deep; and there the prosecution rested.

The defendant thereupon, to maintain and prove the issue upon his part joined, introduced several witnesses and took the stand in his own behalf. The evidence given by the several witnesses, as aforesaid, and by himself, as aforesaid, tended to prove the defendant's previous reputation as a peaceful and law-abiding citizen, the deceased's previous reputation as a quarrelsome and violent woman; that the deceased had on previous occasions assaulted the defendant, on one occasion throwing at the defendant a beer mug, and on another occasion cutting the defendant with a penknife; that the deceased had previously threatened the life of the defendant, and that the defendant knew of said threat; that on the morning of the homicide, and immediaiely before the sounds accompanying the said homicide, there had been a quarrel between the deceased and the defendant; that upon the arrest of the defendant, immediately after the homicide, there was a bleeding wound upon the face of the defendant. The defendant went on the stand in his own behalf, testified that the wounds in the head of Rosa Talbert which caused her death were inflicted by him upon the said Rosa Talbert with a hatchet The defendant denied that he had ever threatened the life of the said Rosa Talbert, and affirmed that he had committed the acts alleged in the indictment while under fear of his life and during the heat and
6 excitement of the quarrel and while suffering pain from a blow of the deceased on his left jaw, where there was an ulcerated sore at the time he received the blow; and thereupon the defendant rested.

And thereupon, the evidence being closed on both sides, the defendant, by his counsel, requested the court to grant the following instructions to the jury:

1. The jury are instructed that if they believe from the evidence that the accused acted under a sincere apprehension of an immediate and actual danger to his life or body, although his life was not in danger, they should acquit.

2. If the jury believe from the evidence that the accused received a blow and immediately revenged it with any instrument he happened to have in his hand, and death ensued, this will be only manslaughter, provided the fatal blow is to be attributed to the passion of anger arising from the previous provocation, and the jury should so find.

3. If the jury believe from the evidence that death ensued in the heat of blood or immediate provocation, there having been no previous malice, the offence is manslaughter, and the jury should so find.

4. If the jury are of the opinion that the wound was given by the prisoner while smarting under a provocation so recent and so strong that the prisoner might be considered as not being at the moment the master of his own understanding, the offence will be manslaughter and the jury should so find.

5. In case the jury find the prisoner guilty of murder, they are instructed that they may qualify their verdict by the words "without capital punishment," no matter what the evidence may be.

6. If the jury, after considering the evidence, have a reasonable doubt that the accused struck the blow in cold blood and with malice aforethought, they should not convict of murder.

The justice presiding refused to grant, as asked and without modification, the first, second, third, fourth, fifth, and sixth of said requests of the defendant, and to which ruling and refusal to grant said first, second, third, fourth, fifth, and sixth requests for instructions the defendant, by his counsel, then and there excepted separately as to each ruling and prayed the presiding justice to note their said several exceptions upon his minutes, which was done.

And after the noting of said exceptions and making the same a part of the record, which is also made a part hereof, the court of its own motion instructed the jury as follows:

Gentlemen of the jury: It has now become my duty to submit to you some instructions upon the law that shall govern you in your deliberations upon the evidence that has been adduced in your hearing, and when I have so done my duty shall have been performed and the whole responsibility in this case and its outcome will rest upon you.

The indictment charges the defendant with the murder of Rosa Talbot. The testimony has established conclusively, without the admission of the defendant upon the stand when he testified
7 as a witness, that the death of Rosa Talbot was accomplished by the defendant by the use of a hatchet, by means of which the defendant made several mortal wounds upon the head of the deceased woman. The defendant took the stand as a witness in his own behalf, and he has admitted that he made the wounds that caused the death of this woman.

He has admitted that the woman was not his wife, although they were living together as man and wife. The testimony of one witness who was produced for the purpose of adding something to your information in this case, that the court was obliged under the rules of evidence to exclude, showed that the deceased woman was the wife of that witness. This adulterous intercourse between this defendant and the woman that he killed resulted, perhaps not unnaturally, in a homicide, and you are to determine upon the evidence whether a crime was committed in the perpetration of that homicide, and, if so, what was the nature of that crime.

While admitting that he inflicted the blows upon the head of the deceased woman that caused her death, the defendant defends as against the ordinary consequences of such an act by the claim—and his testimony in support of the claim—that this act of his that accomplished the death of his victim was a necessary act for his own protection; that he killed her in self-defense. If that is not so, he says, if he were not justified in defending himself against an assault made by her upon him, which was of such aggravated nature as compelled him to act as he did, yet the nature of that assault was such that he was rendered furiously angry; that his reason was dethroned for the time being, and that he struck these fatal blows under the impulse of passion recently and reasonably excited, and if he is not guiltless under the law, in your judgment, then he is guilty only of manslaughter.

The indictment charges that the defendant is guilty of murder. The indictment, however, is but a charge. It is the assertion of the fact. Under such an indictment the jury may find any one of several verdicts, as the evidence may satisfy them under their oaths that such verdict is the proper and just one under all the circumstances in the case. The jury may render a verdict of not guilty, if they are satisfied from the evidence that the defendant in killing this woman was justified by the law of self-defense. The jury may return a verdict of guilty of manslaughter under such an indictment as this, if not satisfied that the defendant perpetrated the act under the necessity of the law of self-defense, but did it in the heat of passion, excited upon and by a reasonable provocation, or the jury may return a verdict of guilty as indicted, if they are satisfied by the evidence that such verdict should be returned.

It becomes necessary, therefore, for the court to give you some suggestions as to what constitutes murder and what constitutes manslaughter and what constitutes the law of self-defense. In so doing, for the purpose of convenience and as the instruction has received the approval of a higher court, I will read the instructions that were given by me in another case:

8 "Murder is the unlawful killing of a human being by a person of sound memory and discretion, with malice aforethought. Manslaughter is the unlawful killing of a human being by a person of sound memory and discretion, without malice. The essential difference between the two crimes is this: that in murder, malice must be established by the evidence, for that is the essence of the crime; but in manslaughter that element is presumed to be wanting. Malice may be expressly indicated by evidence of declarations which evince a malignant disposition and purpose, such as threats to kill. Malice may be implied from circumstances, and they may be as forceful and indicative of its existence as the most direct expressions by word of mouth, as, for instance, the character of the assault and the means used to accomplish the homicide.

"Malice need not be solely directed to the deceased. It does not mean only an expression of hatred or ill will to an individual, but it means any wicked or mischievous intention of the mind prompting to an act. It is not necessary, to make out the crime of murder, to show that the witness had any enmity to the deceased.

"Evidence of the absence of ill will can not furnish an accused person with any defense when it is proved that the act of killing was intentional and done without any justifiable cause.

"Malice is presumed or implied when a man commits an unlawful act unaccompanied by circumstances justifying its commission. It is then presumed that he has acted advisedly and with an intent to produce the natural consequences of such an act."

Inasmuch as a wound from a hatchet, used as the testimony in this case indicates that implement was used in accomplishing the death of the deceased, is likely to produce death, the court instructs you that such an instrument is a deadly weapon, and when a wound is made by a deadly weapon which may and actually does cause death, if made without such provocation or under such circumstances as reduce the crime to manslaughter, or under such circumstances as fail to indicate that any crime has been committed, such act is deemed malicious, and the killing is murder.

"Malice aforethought, therefore, may mean that evil impulse which prompts the execution of an unlawful act upon another that may and does result in death. It may exist as the result of deliberation and premeditation for minutes, hours, days, or any length of time before the act that is its climax and chief expression is committed, and it may exist for no appreciable time before. It may be as slow in forming as would consume weeks in deliberation and premeditation, and it may be as quick in conception and purpose as the flash of thought. Premeditation and deliberation may be elements of malice aforethought, but they are not essential to its existence, and malice aforethought, in the sence of the law, frequently does exist without either deliberation or premeditation.

"There is no particular period during which it is necessary that malice should have existed or the prisoner should have contemplated the homicide. If, for example, the intent to kill or to do other great bodily harm is executed the instant it springs into the mind, the offence is as truly murder as if had existed there for a longer period.

"An unlawful killing is a killing without justifiable or excusable cause. Such killing, if malicious, is murder, and if without malice, is manslaughter. If one kill another by an act of carelessness or negligence, or in the heat of sudden passion excited by recent, reasonable provocation, or under circumstances of an actual but not a reasonable apprehension of serious bodily harm or the loss of life at the hands of the person killed, and without malice, it is unlawful and he is guilty of manslaughter."

As to reasonable provocation, it may be well to say that words, however opprobrious or improper they may be, are never judged to be reasonable provocation for passion; neither is a slight blow from the hand of a person who is the inferior in strength—for instance, a slight blow from the hand of a child, or a slight blow from the hand of a woman.

It is impossible, however, for the court to lay down a definite, fixed rule as to what will justify and be considered reasonable provocation. It is a question that must always be left to the jury, and with the jury the question always must be whether, putting yourself in the place of the party who claims that he was reasonably provoked and his passion so excited by an act that he killed the party exciting his passion in the heat of that passion, the circumstances relied upon as provocation, as indicating reasonable provocation, is such a circumstance as a reasonable man, situated as he was, would have been excited by it to the degree of passion which would lead him to perpetrate a homicide.

"The right of self-defense is the right to immunity from the consequences of acts done under the actual or reasonably apparent necessity for the protection of life or limb. If one who is free from fault himself, who has not sought to bring about the difficulty, is assaulted by another in such a serious manner as to cause him to reasonably and honestly apprehend imminent danger to himself, either of loss of life or great bodily harm from his assailant, from which he has no way of escape, kills his assailant, he is held justified by the law of necessity, and is not guilty of either murder or manslaughter."

The first question for you to determine, taking the several questions in their inverse order, would be whether the evidence that you have

heard is of such character as to justify you in acquitting the defendant on the ground that the act that he perpetrated was perpetrated under the necessity of self-defense.

In order to justify that claim, it should appear to you by the evidence that the assault that the defendant has claimed was made upon him by the deceased woman was of such character and made under such circumstances that the defendant had reason to believe, had reason to apprehend, and honestly did apprehend from that assault either the loss of his own life or great bodily harm to himself.

Great bodily harm, you will readily see, does not mean a slight blow with the hand or a blow with anything that was of such a nature as not likely either to cause death or to occasion great bodily harm. A man is not justified in killing his assailant if he simply apprehends a slight bruise, or if he apprehends anything less than great bodily harm or loss of life. He must not only apprehend such great bodily harm or loss of life—honestly apprehend it—but the circumstances must be such that you, putting yourself in his place, as reasonable men, would say that there was reason to apprehend such great harm to himself or loss of life.

Has the defendant made out such a case as indicates a reasonable or apparent necessity to protect himself against an assault from this woman by the use of a deadly weapon upon her? In determining the proper answer to that question you should consider all the circumstances that have been detailed in evidence; consider the relations *to* the parties. They were not married. They were under no necessity of living together. They were living together in open violation of the law. Consider such testimony as you have had adduced in your hearing of former quarrels, of former assaults, and the manner in which such former quarrels or such former assaults affected the defendant, as indicating the probability or improbability of his being impressed at the time that she, as he said, made an assault upon him, with the necessity of protecting himself from an injury at her hands by the use of a deadly weapon. Consider the relative size and weight and strength of this man and the woman.

And with reference to this question, whether these blows were struck for the purpose of defending his own body from serious injury, consider the character of the blows, the weapon used, the number of blows that were inflicted, and from all these circumstances ascertain whether the claim by the defendant that he was acting in self-defense is well founded. If you believe from the evidence that this claim is well founded, in view of the statement of the law, as the court has given it to you, you should return a verdict of not guilty. If, however, you are not satisfied that that defense has been made out, you should inquire, in the next place, whether only the crime of manslaughter has been committed.

You should not convict this defendant of manslaugter unless you are satisfied of his guilt, unless the evidence is such that you are convinced of his guilt, unless you believe from the evidence, beyond a reasonable doubt, that he is guilty.

A reasonable doubt is a doubt that reasonable men would entertain of guilt after listening to the evidence and carefully scrutinizing it and weighing it. It does not mean any sort of captious doubt that the mind of man may raise, for, as I have had frequent occasion to say, some men

are so constituted that they will doubt anything—they will doubt the evidence of their own senses—but it means such a doubt as reasonable men entertain after carefully weighing and scrutinizing the evidence. The defendant is entitled to the benefit of such doubt, and he should not be convicted of either manslaughter or murder if the jury entertain such a doubt.

11 As I have already indicated to you, gentlemen, manslaughter is an unlawful killing without malice. Manslaughter may be a mere act of negligence. Manslaughter may be made out by circumstances that indicate that the party perpetrating the homicide, while not acting in self-defense, yet committed the homicide in the heat of passion that was excited upon recent reasonable provocation. Manslaughter may also be indicated by such state of facts as show that the party perpetrating the homicide, honestly believing that his life was in danger, but forming such apprehension carelessly and negligently, under circumstances that showed the jury that he ought not to have entertained any such apprehension, yet kills under the impulse of such fear.

It is for you to say whether the circumstances that have been detailed by the defendant are such as would bring him within the definition that the court has given you and within the limitation of the law of manslaughter as it has been asked in behalf of the defendant. It is not enough that the homicide is perpetrated in the heat of passion. If a man perpetrates a homicide in the heat of passion that is not reasonably excited, passion that ought not to have been excited by the circumstances which he claims excited him, then he has no right to claim that the homicide is manslaughter because perpetrated in the heat of passion. The heat of passion must be such passion as is excited by recent reasonable provocation.

Did the defendant have such reasonable provocation? That is the question that the court will submit absolutely to you, gentlemen. I can not throw any further light upon it than I have. The question is simply this: Whether you, as reasonable men, putting yourselves in the place of the defendant at the time he says he was attacked by the deceased, if you believe that he was attacked, should have been so angry, so excited to passion of such degree and extent as would lead you to perpetrate the act that he committed upon the head of this woman?

If you do not believe that the homicide was justified by the apparent necessity of self-defense, as the court has defined that to you, or that the mortal wounds were inflicted upon the deceased by the defendant in the heat of passion, excited by a reasonable provocation, and you do believe from the evidence, beyond a reasonable doubt, as the court has defined that expression to you, that the defendant made those wounds upon the deceased wilfully and maliciously, your verdict should be guilty as indicted.

The court has defined to you malice. Whether malice existed in this case, as the court has already intimated to you, is to be determined by the testimony, if you credit it, of previous threats, and the denial of having made such threats by the defendant, the character of the wounds that were inflicted, their number, and the situation and relation of the parties to this conflict at the time the several wounds were made, the relative size and weight of the two combatants, if you believe there was a combat, and all the other circumstances in evidence.

If you should reach the conclusion, gentlemen of the jury,
12 that your verdict should be guilty as indicted, it is your right, under a recent act of Congress, passed in January, 1897, to add to this verdict "without capital punishment."

As I had occasion to remark yesterday, the jury have this power in any given case. The court can not control your act at all. The court can only advise you as to the law. The responsibility is entirely with you, and you can render such verdict as you please. I mean that you have the power to do it. You can render a verdict of not guilty in a case where the evidence clearly shows guilt. Of course, such action on the part of the jury would be a direct violation of their oaths. If the jury believe a man was guilty, and simply out of pity or sympathy or mercy, rendered a verdict of not guilty, they would violate their oaths.

I have no doubt that this act of Congress was intended to serve some useful purpose. The penalty for murder has not been disturbed by this act of Congress; it is fixed by law; the jury neither make nor unmake it. Doubtless the intention *the* the legislature was this: that in a case in which the jury reach the conclusion that the party on trial is guilty of murder circumstances are shown by the evidence that are of a palliating nature, they may give the defendant the benefit of those palliating circumstances and say in their verdict, "without capital punishment." If, however, the jury believe that there are no palliating circumstances, it is their duty not to add anything, but to leave the penalty as it stands. It may be that a provision of this kind in the law was intended to apply to a case somewhat like that suggested by the District attorney. Suppose a man knowing that his wife had been in improper relations with another man and roused to anger by such knowledge, but postponing from time to time, while he meets this man, the execution of his vengeance upon him, he finally concludes to and does kill him, that would be murder—a clear case of murder under the law; but those circumstances might be such as would convince the jury that the extreme penalty of the law ought not to be inflicted. There may be other cases. I simply give that as an illustration. But the object of this penalty, gentlemen of the jury, is to protect society; and the jury should not interfere with it under any circumstances, unless the circumstances are such as to satisfy them that this provision should be added to the verdict.

I should say right here, gentlemen, that if you reach the conclusion of guilt—"Guilty as indicted"—it is your duty to return that verdict; and unless you unanimously agree that the verdict should be qualified as the statute provides you may qualify it, there can be no qualification. It must be the unanimous conclusion of the jury. The question for you to ask yourselves is this: Are the circumstances in this case such (if you reach the conclusion that the defendant is guilty as indicted) as to require you, upon your oaths, to interfere with the penalty fixed by law? The defendant and the woman he slew were living together in adultery. It
may be that neither of them was a good and useful citizen in this
13 community; but he is entitled to the protection of the law. He should not be convicted unless the evidence justifies a verdict of guilty, as the court has explained to you. She was also entitled to the protection of the law, and the mere fact that she was a woman of loose morals, living in open adultery with this man, should make no difference whatever with you in your judgment upon the evidence.

The responsibility of the outcome of this case is with you entirely. The court can not help you any further. You are not responsible for the law. The law has been made by the Congress of the United States and has received the approval of the Chief Executive. It was made for your protection and for mine. The law should be vindicated in any case and every case where the evidence shows that it has been violated. Neither are you responsible for the situation or state of affairs that has been shown by this prosecution and the evidence in support of it. If this man killed this woman, he created the situation. You are not responsible for it. You are simply to determine, upon your oaths, whether the circumstances are such as to require you to return a verdict of guilty as indicted; or, if not guilty as indicted, whether it justifies you, requires you, to return a verdict of guilty of manslaughter; or, if not guilty of either murder or manslaughter, a verdict of not guilty.

Now, gentlemen, take this case and dispose of it, considering simply the law and the evidence you have heard, being actuated by no motives whatever, either of revenge or sympathy. Do justice between this man and the United States.

The defendant thereupon, by his counsel, and before the jury retired to consider of its verdict, specifically excepted to that portion of the said instruction of the court to the jury relating to the act of January 15, 1897. After the noting of said exception to said instruction of the presiding justice to the jury and making the same a part of the record, and which is also made a part hereof, the jury retired to deliberate upon its verdict.

And because the aforesaid action of the court in refusing the requests of the defendant, as aforesaid, does not appear of record, the defendant, by his counsel, prays the justice presiding to sign and seal this his bill of exceptions, which is accordingly done, now for then, this 20th day of April, A. D. 1898.

A. C. BRADLEY, *Justice.* [SEAL.]

Supreme court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 23, inclusive, are true copies of the originals in case No. 21474, criminal, United States vs. William M. Strather, as the same remains upon the files and records of said court.

14 In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 25th day of April, A. D. 1898.

JOHN R. YOUNG, *Clerk.*

[Seal supreme court of the District of Columbia.]

(Endorsed on cover:) District of Columbia supreme court. No. 795. William M. Strather, appellant, vs. The United States. Court of appeals, District of Columbia. Filed Apr. 25, 1898. Robert Willett, clerk.

15 TUESDAY, *May 17th, A. D. 1898.*

WILLIAM M. STRATHER, APPELLANT,
vs.
THE UNITED STATES; } No. 795.

and

EDWARD SMITH, APPELLANT,
vs.
THE UNITED STATES; } No. 797.

and

CHARLES WINSTON, APPELLANT,
vs.
THE UNITED STATES. } No. 804.

The argument in the above-entitled causes was commenced by Mr. B. T. Roodhouse, attorney for the appellant in No. 795, and was continued by Mr. George Kearney, attorney for the appellant in No. 804, and by Mr. Warder Voorhees, attorney for the appellant in No. 797, and by Messrs. John E. Laskey and D. W. Baker, attorneys for the appellee, and by Mr. Charles H. Turner, attorney for the appellant in No. 804, and was concluded by Mr. Samuel D. Truitt, attorney for the appellant in No. 795.

16 WILLIAM M. STRATHER, APPELLANT,
vs.
THE UNITED STATES. } No. 795.

Mr. Chief Justice Alvey delivered the opinion of the court:

The indictment in this case is for murder, found under section 5339, Revised Statutes of the United States, which provides that "every person who commits murder within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States, * * * shall suffer death." This provision, though found in the general revision of the statutes of the United States, and not in the revision of the statutes relating to the District of Columbia alone, is nevertheless in full force in this District. That has been decided in several cases and is no longer an open question. United States vs. Norris, 1 Cr. C. C., 412; United States vs. Guiteau, 1 Mackey, 498; United States vs. Barber, 20 D. C. Rep., 79; United States vs. Cross, 20 D. C. Rep., 365.

The appellant, William M. Strather, was indicted on the 31st day of December, 1897, for the crime of wilful murder, charged to have been committed in killing one Rosa Talbert, on the 15th day of October, 1897. To the indictment the accused pleaded not guilty, and he was duly tried by a jury, who rendered a verdict of guilty as indicted without more; whereupon he was sentenced by the court to be hung. He has appealed.

To the decision of the questions presented on this appeal it is not necessary or material to recite the facts of the case as set out in the bill of exceptions. The prisoner on the trial offered six prayers for specific instructions to the jury, which were refused by the court. The first four

of these prayers related to questions of justification and to provocation that would reduce the homicide to manslaughter; and the fifth prayer asked that the jury be instructed that they might qualify their verdict, under the statute, with the words "without capital punishment," "no matter what they might find the evidence to be;" and the sixth prayer asked that the jury be instructed that if they should have a reason-
17 able doubt whether the accused struck the fatal blow in cold blood and with malice aforethought, they should not convict of murder. The court was clearly right in rejecting all of these prayers, as they were greatly calculated to mislead the jury if they had been granted.

The subjects of all these several prayers, however, were fully covered, and clearly explained, by the judge in his very carefully prepared charge to the jury. He stated fully what would constitute murder and what manslaughter, and what would be excusable or justifiable homicide, committed in self-defence, as defined by the authorities. Indeed, all the questions raised in the defence of the accused were fully and clearly defined, and fairly submitted to the jury. And that the full scope and textual reading of the charge may appear, we direct that the charge in extenso be inserted by the reporter in the statement of the case.

There are two principal questions presented by this appeal on the charge of the judge to the jury: First, whether the act of Congress of the 15th of January, 1897, referred to in the charge of the judge, applies to this District; and, if applicable, second, whether the construction and the terms of the charge as to the manner and circumstances of applying the statute, as given by the judge, were correct? If, however, the statute is not applicable to this District, it is quite clear the appellant was not prejudiced, nor in any manner affected, by either the charge of the judge as to the construction of the statute *nor* by the finding of the jury under the charge, as the statute simply relates to a qualification of the verdict as to the punishment after finding the party guilty of murder.

1. In the case of Fearson vs. United States, 10 App. D. C., 506, the question whether the act of Congress of Jan. 15, 1897, applied to this District was raised in argument, but it was not deemed necessary to decide it. It is therefore an open question whether or not the act applies to this District.

18 The act of January 15, 1897, provides, "That in all cases where the accused is found guilty of the crime of murder or of rape under sections fifty-three hundred and thirty-nine or fifty-three hundred and forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment at hard labor for life."

This act is amendatory of sections of the Revised Statutes therein referred to, and it manifestly was intended to have a general application and to extend to all places and districts over which Congress has general and exclusive legislative power, and certainly to all places and districts to which section 5339 of the Revised Statutes has application. It was not intended to have a less general application than the section to which it is an amendment. And, therefore, as section 5339 of the Revised Statutes, if not by its own express terms made applicable to this District, is made applicable by a different Congressional provision, and by judicial

construction; and there can be no reason why the amendatory act of January 15, 1897, is not equally and alike applicable to this District, so far as the crime of murder is concerned. In the act of Congress of the 21st of February, 1871 (16 Stats., 419), to provide a local government for this District, by its 34th section, it was expressly declared that "the Constitution, and all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said District of Columbia as elsewhere within the United States." Rev. Sts. D. C., sec. 93. And this provision has not been repealed by the subsequent acts of Congress substituting a different form of government for the District. Page vs. Burnstine, 102 U. S., 664, 667. It is not pretended, nor is there any ground for the least pretence, that there is anything in the existing laws applicable to this District that would be in conflict with the provision of the amendatory act of January 15, 1897, as to the crime of murder, or that would in any manner render the latter act locally applicable as to that crime.

19 We conclude, therefore, that the amendatory act of Jan. 15, 1897, is equally applicable to this District as and with section 5339 of the Revised Statutes so far as the same relates to the crime of murder.

2. Then, the next question is, whether there was error in the charge given by the court below as to the construction and the circumstances of the application of the amendatory act of Jan. 15, 1897, where the party accused has been found guilty of the crime of murder. It is contended on the part of the appellant that, by reasonable construction, the jury should be left free to declare in their verdict "without capital punishment," no matter what the evidence might be, though it be of the most atrocious and unmitigated character; and that the court has no right to instruct the jury under what circumstances the qualified or mitigated punishment should or should not be inflicted upon the party convicted; that the matter is entirely within the discretion of the jury, without any reference whatever to the circumstances of aggravation or mitigation, as shown in the proof, whether the party found guilty of murder should suffer the penalty of death or an imprisonment for life; and that the court has no right to enlighten the jury by instruction as to the proper manner of exercising their discretion with respect to the facts of the case. The court may inform the jury what constitutes murder, and analyse the crime, and descant upon the evidence, and call the attention of the jury to all the most atrocious and malicious features of the case, but, according to the present contention, it is not allowable to the court, by way of aiding the jury in arriving at a fair and just conclusion, to suggest what punishment would be proper under all the circumstances of the case. To such a contention we can not accede.

If Congress had intended to abolish capital punishment for murder, without regard to the facts of the case, however atrocious in their

20 nature, it would have done so without qualification. But Congress has not abolished capital punishment for murder, but has made the degree of punishment to depend upon the special circumstances of each case as they may be found by the jury. In many of the States, as we know, if not in a majority of them, it has long since been deemed proper and just to divide the common law crime of murder into first

and second degrees, and to prescribe the punishment accordingly. This is done because it is common experience that the general common law crime of murder often includes different degrees of atrociousness, such as to make it just to discriminate as to the degrees of punishment to be inflicted upon conviction, though the crime may be embraced under the general denomination of murder. In such cases, the trial juries are required to find in their verdict the degree of murder of which the party is guilty, and the court imposes the punishment prescribed by law. The legislation of many of the States upon this subject is referred to in the opinion of the Supreme Court of the United States, in the case of Davis vs. Utah Territory, 151 U. S., 262, 267, 268–9. But Congress, instead of dividing the crime of murder into two degrees and designating what should constitute murder in the first degree and what murder in the second degree, have done substantially something of the same nature in a different way. Under the general charge of murder, the jury are allowed to find their verdict with reference to the facts of the case, and to either find the party guilty as charged simply, which requires punishment by death, or to find him guilty "without capital punishment," which requires imprisonment for life. This finding, however, should be made with reference to the facts of the case, as it is manifest that it was never intended that a party shown to have committed the crime under the most revolting and atrocious circumstances should receive the qualified or mitigated punishment, and a party under much less revolting and atrocious circumstances should or might receive punishment by death, according to the temper and notions of different juries trying the parties. Such a principle applied in the
21 administration of justice would at once destroy that which is the most essential element of all law, and that is its certainty as applied to all parties alike, and not allowed in its application to be dependent upon the mere arbitrary whims or discretion of juries, without reference to the facts attending the commission of the crime. It is a settled principle in the administration of the criminal law in the courts of the United States that the judge charges the jury upon the whole case, both as to the law and the facts, but leaving the jury entirely free to find the facts according to the exercise of their own untrammelled judgment. The judge may arrange and comment upon the evidence of the case as a means of aiding a jury in reaching a just conclusion, but the jury must be made to understand that it is their exclusive province to determine what facts are established by the proof. But in regard to the law in criminal cases, it is the duty of the jury to receive it from the court, and to apply it as given by the court, subject, however, to the condition that by a general verdict a jury of necessity determines both law and fact as compounded in the issue submitted to them in the particular case. (Sparf and Hansen vs. United States, 156 U. S., 51.) And where a statute is involved and its construction becomes necessary for the guidance of the jury, that is matter of law, and, of course, is for the court. In construing a statute it is not only the letter, but the spirit, the reason, and legislative intent that must be regarded, and that, in all cases, presents a question for the court. And in the statute under consideration there is nothing to indicate an intention on the part of Congress to divert the court of its legitimate function, in cases where the provision of the statute is applicable.

In no case has the question of the right of the court to instruct the jury upon the entire law of the case been more firmly met, and the principle more clearly and concisely stated than by Mr. Justice Story in the case of United States vs. Battiste, 2 Sum., 240, 243–4.

22 That was a trial for a capital crime under the act of Congress of May 15, 1820, Ch. 113, to suppress the slave trade; and it appears that counsel had insisted that the jury were the judges of the law, as well as of the facts. But the learned justice, in his charge to the jury, said: "But I deny that, in any case, civil or criminal, they (the jury) have the moral right to decide the law according to their own notions or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime that the jury should respond as to the facts and the court as to the law. It is the duty of the court to instruct the jury as to the law, and it is the duty of the jury to follow the law as it is laid down by the court. This is the right of every citizen, and it is his only protection. If the jury were at liberty to settle the law for themselves the effect would be not only that the law itself would be most uncertain from the different views which different juries might take of it, but in case of error there would be no remedy or redress by the injured party, for the court would not have any right to review the law as it had been settled by the jury. Indeed, it would be almost impracticable to ascertain what the law, as settled by the jury, actually was. On the contrary, if the court should err in laying down the law to the jury, there is an adequate remedy for the injured party by a motion for a new trial or a writ of error, as the nature of the jurisdiction of the particular court may require. Every person accused as a criminal has a right to be tried according to the law of the land—the fixed law of the land—and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it."

The same question was most exhaustively considered by the late Mr. Justice Curtis in the case of the United States vs. Morris (1 Curtis, 23, 52–58). In that case it was contended that the jury in all criminal cases in the courts of the United States were the rightful judges of the existence, construction, and effect of every law that was material in a

23 criminal case. But, in response to that contention, Mr. Justice Curtis, among other things, said:

"It was evidently the intention of the Constitution that all persons engaged in making, expounding, and executing the laws, not only under the authority of the United States but of the several States, should be bound by oath or affirmation to support the Constitution of the United States. But no such oath or affirmation is required of jurors, to whom it is alleged the Constitution confides the power of expounding that instrument; and not only construing, but holding invalid any law which may come in question on a criminal trial." * * * "In my opinion, it is the duty of the court to decide every question of law which arises in a criminal trial if the question touches any matter affecting the course of the trial, such as the competency of a witness, the admissibility of evidence, and the like, the jury receive no direction concerning it; it affects the materials out of which they are to form their verdict, but they have no more concern with it than they would have had if the question had arisen in some other trial. If the question of law enters into the

issue, and forms part of it, the jury are to be told what the law is, and they are bound to consider that they are told truly; that law they apply to the facts as they find them, and thus, passing both on the law and the facts, they, from both, frame their general verdict of guiity or not guilty. Such is my view of the respective duties of the different parts of this tribunal in the trial of criminal cases, and I have not found a single decision of any court in England, prior to the formation of the Constitution, which conflicts with it."

These decisons of the two distinguished jurists, who were at the time justices of the Supreme Court of the United States, but then presiding in the circuit court, have been fully approved and adopted by a majority of the Supreme Court, in Sparf and Hansen vs. United States, supra, where the whole subject has been most elaborately and ably con-
24 sidered in opinions of both the majority and minority of the learned justices sitting in that case.

In the present case the justice, at the trial below, fully charged the jury both as to the law and as to his view of the facts, but leaving the facts entirely to the jury. And with respect to the amendatory act of January 15, 1897, the judge was explicit in charging the jury that if they concluded that the accused was guilty of murder it was their right, under the act of Congress, to add to their verdict "without capital punishment." He further said: "I have no doubt that this act of Congress was intended to serve some useful purpose. The penalty for murder has not been disturbed by this act of Congress; that is fixed by law, and the jury can neither make nor unmake it. Doubtless the intention of the legislature was this: that in a case in which the jury reached the conclusion that the party on trial is guilty of murder and circumstances are shown by the evidence that are of a palliating nature they may give the accused the benefit of those palliating circumstances, and say in their verdict, "without capital punishment." If, however, the jury believe that there are no palliating circumstances it is their duty not to add anything to their verdict, but to leave the penalty as it stands." And the judge further added: "But the object of this penalty is to protect society; and the jury should not interfere with it under any circumstances, unless the circumstances are such as to satisfy the jury that this qualification provided by the statute should be added to their verdict."

This, we think, was clearly right. If it was not the intention of Congress to abolish capital punishment, but to leave the matter of degree of guilt to the finding of the jury, that must, in the nature of things, depend upon the facts of the case. We think the judge below was strictly right in the interpretation of the act of the 15th of January, 1897, and that there was no error in the terms of the charge to the jury. The jury were left entirely free, under the instruction of the court, to determine the question, whether the circumstances of the crime charged were
25 of a character to justify them in returning a verdict for the mitigated punishment, or such as was returned by them.

In several of the States of the Union statutes substantially similar to that of the act of Congress of January 15, 1897, exist, and in many of such States those statutes have been construed by the courts and given practical application; and, with but one or two exceptions, brought to our attention, those statutes have been construed and applied, under the

direction of the courts, in the same manner that the act here in question has been construed and applied by the court below, in the charge given the jury. The People vs. Welch, 49 Cal., 179; People vs. Brick, 68 Cal., 190; People vs. Bawden, 90 Cal., 195; Brown vs. State, 109 Ala., 70; Inman vs. The State, 72 Ga., 269; Valentine vs. The State, 77 Ga., 483; Nowacryk vs. State, 139 Ill., 336. In all these cases, upon statutes substantially similar to the act of Congress here involved, the courts have held that the degree of punishment should be determined with reference to the special facts and circumstances of the case.

Finding no error, the judgment appealed from must be affirmed; and it is so ordered.

Judgt. affirmed.

26 WILLIAM M. STRATHER, APPELLANT, *vs.* THE UNITED STATES; No. 795.

and

EDWARD SMITH, APPELLANT, *vs.* THE UNITED STATES; No. 797.

and

CHARLES WINSTON, APPELLANT, *vs.* THE UNITED STATES. No. 804.

Dissenting opinion of Mr. Justice Shepard.

I am unable to concur with my brothers in their construction of the act of Congress which provides that when an accused person shall be found guilty of murder, "the jury may qualify their verdict by adding, 'without capital punishment.'"

In my opinion, the language of the act is plain and affords no room for construction—for appeal from its letter to its spirit.

Public policy in respect of the punishment of offenses is a matter within the exclusive control of Congress, and departures therein, whether to be regarded as wise or unwise, must be given effect to as declared.

To my mind, it appears plain, that whilst Congress did not abolish capital punishment for the crime of murder, it nevertheless committed the matter of its infliction to the uncontrolled discretion of the jury in each case.

If it had been intended that the exercise of this power of commutation of the death penalty should depend upon the court, or upon the jury, subject to the advice and admonition of the court, I think it would have been expressly so declared.

Whether, in the exercise of an unlimited discretion, juries may or may not make distinctions between criminals, not justified by the conditions of their respective cases, or, in practice, virtually abolish the death penalty, is wholly beside the question. In the exercise of its own undoubted discretion in the premises, Congress has seen proper to commit the power to the jury, and to the jury alone.

27 In construing the statute to mean that the court may, without error, admonish the jury in respect of the grounds upon which they may commute the death penalty by the addition to their verdict, it is not denied that he is compelled also to instruct them that it is their privilege to exercise the power notwithstanding.

With such instructions as were given in this case, no jury, composed of good citizens, accustomed, as it is their duty, to accept and apply the law as given them in charge by the court, could have extended clemency to any one of these appellants.

After such an admonition, to such a jury, the further information that they might, nevertheless, commute the punishment was but a meaningless formality. It did not give the accused the benefit of the statute.

I cannot accept as sound the argument that the purpose of Congress in this enactment was substantially the same as shown in the legislation of the States, whereby the offense of murder has been divided into two degrees—murder of the first and murder of the second degree.

On the contrary, it seems to me that there is a substantial difference of purpose. Under the State statutes referred to, murder of the first degree consists of homicide committed in the perpetration of offenses like rape, robbery, arson, and burglary, or by poison, starvation, torture, and so forth, showing express malice. All murder not included in the definition of the first is murder of the second degree.

In the enforcement of those statutes the courts are required to declare the law to the jury in application to the facts. Where the evidence shows plainly that the accused, if guilty at all, is guilty of murder of the first degree and nothing less, it is the duty of the court to withhold from the jury the privilege of returning a verdict of guilty of murder of the second degree. The court is not required to submit the question of the degree of guilt to the jury, regardless of the evidence, as under the act of Congress it is compelled to extend to them the privilege of commuting the death penalty.

If the purposes of the two sets of statutes are the same, it would be more reasonable to hold that, under the act of Congress, the right to commute the death penalty should not be accorded to the jury at all, unless the evidence should discover something tending to warrant the exercise of clemency.

For the reasons given, I am of the opinion that the judgment in each case should be reversed.

28 Court of appeals of the District of Columbia. April term, 1898.

WILLIAM M. STRATHER, APPELLANT, }
vs. } No. 795.
THE UNITED STATES. }

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed.

Per Mr. Chief Justice Alvey, June 7, 1898.
Dissenting, Mr. Justice Shepard.

(Indorsed:) Court of appeals of the district of Columbia. April term, 1898. No. 795. Judgment. Court of appeals, District of Columbia. Filed June 7, 1898. Robert Willett, clerk.

29 Court of appeals of the District of Columbia.

I, Robert Willett, clerk of the court of appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 28, inclusive, contain a true copy of the transcript of record and proceedings of said court of appeals in the case of William M. Strather, appellant, vs. The United States, No. 795, April term, 1898, as the same remain upon the files and records of said court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said court of appeals, at the city of Washington, this 8th day of October, A. D. 1898.

[SEAL.] ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

(Indorsement on cover:) Case No. 17017. District of Columbia court of appeals. Term No., 432. William M. Strather, petitioner, vs. The United States. Filed October 11, 1898.

15611

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 432.

WILLIAM M. STRATHER, PETITIONER,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT OF SAME.

SAMUEL D. TRUITT,
TRACY L. JEFFORDS,
Attorneys for Petitioner.

1 In the Supreme Court of the United States. October term, 1898.

WILLIAM M. STRATHER, PETITIONER,
v. No. 432.
THE UNITED STATES, RESPONDENT.

Petition of William M. Strather for a writ of certiorari to the court of appeals of the District of Columbia.

To the honorable the Supreme Court of the United States:

The petition of William M. Strather respectfully shows to this honorable court as follows:

1st. That he is a citizen of the United States and a resident of the District of Columbia.

2 2d. That heretofore, to wit, on the 31st day of December, 1897, in the supreme court of the District of Columbia, holding a criminal term, the grand jury of the United States of America, in and for the District of Columbia, at said term of said court, found, returned, and filed in said court against your petitioner an indictment charging him under section 5339 of the Revised Statutes of the United States, with the crime of murder. Said section reads as follows:

Every person who commits murder—

1st. Within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States;

2d. Or upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty and maritime
3 jurisdiction of the United States, and out of the jurisdiction of any particular State;

3d. Or who upon any such waters maliciously strikes, stabs, wounds, poisons, or shoots at any other person, of which striking, stabbing, wounding, poisoning, or shooting such other person dies, either on land or at sea, within or without the United States, shall suffer death."

3d. That thereupon the trial of your petitioner upon and under said indictment was proceeded in, and on, to wit, the 10th day of February, 1898, the jury impanelled to try said cause returned a verdict of "Guilty in manner and form as charged in the indictment" against your petitioner.

4th. That thereupon and within the time therefor limited your petitioner filed in said court a motion for a new trial, alleging
4 various errors occurring during the trial of said case prejudicial to the defendant, but more particularly to the error committed by the trial judge in his charge to the jury as to his construction and interpretation of the act of Congress approved January 15, 1897, entitled "An act to reduce the cases in which the penalty of death may be inflicted." (Vol. 29, Statutes at Large, page 487.) Said act is as follows:

"That in all cases where the accused is found guilty of the crime of murder or of rape under sections fifty-three hundred and thirty-nine or fifty-three hundred and forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto 'without capital punishment,' and whenever the jury shall return a verdict qualified as aforesaid, the person con-

victed shall be sentenced to imprisonment at hard labor for life."

The charge with relation to the act is as follows:

"If you should reach the conclusion, gentlemen of the jury, that your verdict should be guilty as indicted, it is your right, under a recent act of Congress, passed in January, 1897, to add to this verdict 'without capital punishment.'

"As I had occasion to remark yesterday, the jury have this power in any given case. The court can not control your act at all. The court can only advise you as to the law. The responsibility is entirely with you, and you can render such verdict as you please. I mean that you have the power to do it. You can render a verdict of not guilty in a case where the evidence clearly shows guilt. Of course, such action on the part of the jury would be a direct violation of their oaths. If the jury believe a man was guilty, and simply out of pity or sympathy
6 or mercy rendered a verdict of not guilty, they would violate their oaths.

"I have no doubt that this act of Congress was intended to serve some useful purpose. The penalty for murder has not been disturbed by this act of Congress; it is fixed by law; the jury neither make nor unmake it.

"Doubtless the intention of the legislature was this: That in a case in which the jury reach the conclusion that the party on trial is guilty of murder, circumstances are shown by the evidence that are of a palliating nature, they may give the defendant the benefit of those palliating circumstances and say in their verdict 'without capital punishment.' If, however, the jury believe that there are no palliating circumstances, it is their duty not to add anything, but to leave the penalty as it stands.

It may be that a provision of this kind in the law was intended
7 to apply to a case somewhat like that suggested by the district attorney. Suppose a man knowing that his wife had been in improper relation with another man, and, roused to anger by such knowledge, but postponing from time to time, while he meets this man, the execution of his vengeance upon him, he finally concludes to and does kill him, that would be murder—a clear case of murder under the law; but those circumstances might be such as would convince the jury that the extreme penalty of the law ought not to be inflicted. There may be other cases; I simply give this as an illustration. But the object of this penalty, gentlemen of the jury, is to protect society, and the jury should not interfere with it under any circumstances, unless the circumstances are such as to satisfy them that this provision should be added to the verdict. I should say right here, gentlemen, that if you reach the
8 conclusion of guilty—'guilty as indicted'—it is your duty to return that verdict; and unless you unanimously agree that the verdict should be qualified as the statute provides you may qualify it, there can be no qualification. It must be the unanimous conclusion of the jury. The question for you to ask yourselves is this: Are the circumstances in this case such (if you reach the conclusion that the defendant is guilty as indicted) as to require you, upon your oaths, to interfere with the penalty fixed by law? The defendant and the woman he slew were living together in adultery. It may be that neither of them was a good and useful citizen in this community, but he is entitled to the protection of the law. He should not be convicted unless the evidence justi-

fies a verdict of guilty, as the court has explained to you. She was also entitled to the protection of the law, and the mere fact that
9 she was a woman of loose morals, living in open adultery with this man, should make no difference whatever with you in your judgment upon the evidence.

"The responsibility of the outcome of this case is with you entirely. The court can not help you any further. You are not responsible for the law. The law has been made by the Congress of the United States, and has received the approval of the Chief Executive. It was made for your protection and for mine. The law should be vindicated in any case and every case where the evidence shows that it has been violated. Neither are you responsible for the situation or state of affairs that has been shown by this prosecution and the evidence in support of it. If this man killed this woman, he created the situation. You are not responsible for it. You are simply to determine, upon your
10 oaths, whether the circumstances are such as to require you to return a verdict of guilty as indicted; or, if not guilty as indicted, whether it justifies you, requires you, to return a verdict of guilty of manslaughter; or, if not guilty of either murder or manslaughter, a verdict of not guilty."

5th. That thereafter, on, to wit, the fourth day of March, 1898, the trial court overruled said motion and entered its judgment and sentence upon said verdict of the jury, as aforesaid, that petitioner be hanged by the neck until he be dead, on Thursday, the fifth day of May, A. D. 1898; whereupon your petitioner prayed an appeal to the said court of appeals from the judgment and sentence of said trial court.

6th. That thereafter, your petitioner having duly perfected his said appeal, the said court of appeals on, to wit, the 7th day of June,
11 1898, rendered its judgment affirming, by a divided court, the judgment and sentence of the trial court, as follows:

"In the presence case, the justice at the trial below fully charged the jury both as to the law and as to his view of the facts, but leaving the facts entirely to the jury. And with respect to the amendatory act of January 15, 1898, the judge was explicit in charging the jury that, if they concluded that the accused was guilty of murder, it was their right, under the act of Congress, to add to their verdict 'without cap'tal punishment.' He further said: 'I have no doubt that this act of Congress was intended to serve some useful purpose. The penalty for murder has not been disturbed by this act of Congress. That is fixed by law, and the jury can neither make nor unmake it. Doubtless the intention of the legislature was this: That in a case in which the jury reached the
12 conclusion that the party on trial is guilty of murder, and circumstances are shown by the evidence that are of a palliating nature, they may give the accused the benefit of those palliating circumstances, and say in their verdict 'without capital punishment.' If, however, the jury believe that there are no palliating circumstances it is their duty not to add anything to their verdict, but to leave the penalty as it stands." And the judge further added: "But the object of this penalty is to protect society; and the jury should not interfere with it under any circumstances, unless the circumstances are such as to satisfy the jury that this qualification provided by the statute should be added to their verdict."

"This, we think, was clearly right. If it was not the intention
13 of Congress to abolish capital punishment, but to leave the matter of degree of guilt to the finding of the jury, that must, in the nature of things, depend upon the facts of the case. We think the judge below was strictly right in the interpretation of the act of the 15th of January, 1897, and that there was no error in the terms of the charge to the jury. The jury were left entirely free under the instructions of the court to determine the question whether the circumstances of the crime charged were of a character to justify them in returning a verdict for the mitigated punishment or such as was returned by them.

"In several of the States of the Union statutes substantially similar to that of the act of Congress of January 15, 1897, exist, and in many of such States those statutes have been construed by the courts and
14 given practical application; and, with but one or two exceptions brought to our attention, those statutes have been construed and applied under the direction of the courts in the same manner that the act here in question has been construed and applied by the court below in the charge given the jury. The People vs. Welch, 49 Cal., 179; People vs. Brick, 68 Cal., 190; People vs. Bowden, 90 Cal., 195; Brown vs. State, 109 Ala., 70; Luman vs. The State, 72 Ga., 269; Valentine vs. The State, 77 Ga., 483; Nowaeryk vs. State, 139 Ill., 336. In all of these cases, upon statutes substantially similar to the act of Congress here involved, the courts have held that the degree of punishment should be determined with reference to the special facts and circumstances of the case.

"Finding no error, the judgment appealed from must be affirmed, and it it so ordered."

15 The dissenting opinion reads as follows:

"I am unable to concur with my brothers in their construction of the act of Congress which provides that when an accused person shall be found guilty of murder the jury may qualify their verdict by adding 'without capital punishment.'

"In my opinion, the language of the act is plain and affords no room for construction—no appeal from its letter to its spirit. Public policy in respect of the punishment of offenses is a matter within the exclusive control of Congress, and departures therein, whether to be regarded as wise or unwise, must be given effect to as declared. To my mind, it appears plain that while Congress did not abolish capital punishment for the crime of murder, it nevertheless committed the matter of its
16 infliction to the uncontrolled discretion of the jury in each case.

"If it had been intended that the exercise of this power of commutation of the death penalty should depend upon the court or upon the jury, subject to the advice and admonition of the court, I think it would have been so expressly declared. Whether in the exercise of an unlimited discretion juries may or may not make distinctions between criminals, not justified by the conditions of their respective cases, or in practice virtually abolish the death penalty, is wholly beside the question. In the exercise of its own undoubted discretion in the premises, Congress has seen proper to commit the power to the jury, and to the jury alone.

"In construing the statute to mean that the court may, without error, admonish the jury in respect of the grounds upon which they may

17 commute the death penalty by the addition to their verdict, it is not denied that he is compelled also to instruct them that it is their privilege to exercise the power notwithstanding. With such instructions as were given in this case, no jury composed of good citizens, accustomed as to their duty to accept and apply the law as given them in charge by the court, could have extended clemency to any one of these appellants. After such an admonition to such a jury, the further information that they might, nevertheless, commute the punishment, was but a meaningless formality. It did not give the accused the benefit of the statute.

"I can not accept as sound the argument that the purpose of Congress in this enactment was substantially the same as shown in the legislation of the State, whereby the offense of murder has been divided into
18 two degrees—murder of the first and murder of the second degree.

"On the contrary, it seems to me that there is a substantial difference of purpose. Under the State statutes referred to, murder of the first degree consists of homicide committed in the perpetration of offenses like rape, robbery, arson, and burglary, or by poison, starvation, torture, and so forth, showing express malice. All murder not included in the definition of the first is murder in the second degree.

"In the enforcement of those statutes the courts are required to declare the law to the jury in application to the facts. Where the evidence shows plainly that the accused, if guilty at all, is guilty of murder of the first degree and nothing less, it is the duty of the court to withhold from the jury the privilege of returning a verdict of guilty of murder
19 of the second degree. The court is not required to submit the question of the degree of guilt to the jury, regardless of the evidence, as under the act of Congress it is compelled to extend to them the privilege of commuting the death penalty. If the purposes of the two sets of statutes are the same, it would be more reasonable to hold that, under the act of Congress, the right to commute the death penalty should not be accorded to the jury at all unless the evidence should discover something tending to warrant the exercise of clemency. For the reasons given, I am of the opinion that the judgment in each case should be reversed."

7th. Your petitioner is advised and believes that the said judg-
20 ment of the court of appeals of the District of Columbia is erroneous, and that this honorable court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the act of the Congress of the United States entitled "An act to authorize the Supreme Court of the United States to issue writs of certiorari to the court of appeals of the District of Columbia in the same cases and manner that it may do in respect of the circuit court of appeals," approved March 3, 1897 (vol. 29, Statute' at Large, page 692), which act is as follows:

Be it enacted, etc., That in any case heretofore made final in the court of appeals of the District of Columbia, it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case
21 to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if had been carried by appeal or writ of error to the Supreme Court.

8th. And your petitioner further shows that, as has been heretofore determined by this court, he has no right of appeal or writ of error in this case, for the reason that this court has no jurisdiction to review the decision of the court of appeals of the District of Columbia in criminal cases except in the manner and as provided in said act of Congress approved March 3, 1897.

9th. Your petitioner respectfully submits that the question presented by this record should be authoritatively and finally adjudged by this honorable court upon and after a full hearing. The case is one of
22 the utmost gravity and importance, not only to your petitioner, but to every citizen in the land, and hence it is of the highest importance that *that* the highest court in the land shall adjudge the law involved in this case, and thus lay down an authoritative and sound rule of construction of said statute for the guidance of the courts in cases of a similar nature.

10th. That on the 27th day of April, 1898, the court of appeals signed an order staying the execution of your petitioner until decision of appeal; the President, on May 5th, 1898, signed an order granting him respite until June 16, 1898. On the 15th day of June, 1898, the President signed another order granting respite to your petitioner until January 5, 1899.

Wherefore your petitioner respectfully prays that he be allowed a hearing on his petition and that a writ of certiorari may be
23 issued out of and under the seal of this court, directed to the court of appeals of the District of Columbia, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said court of appeals of the District of Columbia in the said case therein, entitled William M. Strather, appellant, v. The United States, No. 795, April term, 1898, to the end that the said case may be reviewed and determined by this court as provided in the act of Congress entitled "An act to authorize the Supreme Court of the United States to issue writs of certiorari to the court of appeals in the same cases and manner that it may do in respect of the circuit court of appeals," approved March 3, 1897, and that your petitioner may have such
24 other and further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said judgment of the said court of appeals of the District of Columbia in said case may be reversed by this honorable court, and your petitioner will ever pray, etc.

WILLIAM M. STRATHER,
Petitioner.
SAMUEL D. TRUITT,
TRACY L. JEFFORDS,
Attorneys for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

I, William M. Strather, being duly sworn, on oath says, that I am the petitioner in the aforegoing petition by me subscribed; that I have read the same and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true.

WILLIAM M. STRATHER.

Sworn and subscribed to before me this 8th day of October, 1898.

[SEAL.] CHARLES W. STETSON,
Notary Public.

25 In the Supreme Court of the United States.

WILLIAM M. STRATHER, PETITIONER,
v.
THE UNITED STATES, RESPONDENT.

To the honorable the Attorney-General of the United States:

SIR: Please take notice that on the 11th day of October, A. D. 1898, at the opening of the court, or soon thereafter as counsel can be heard, the petition, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of said court thereon.

SAMUEL D. TRUITT,
TRACY L. JEFFORDS,
Attorneys for Petitioner.

The foregoing notice is hereby accepted, and service of a copy of said petition for writ of certiorari is hereby acknowledged this 10th day of October, 1898.

HENRY E. DAVIS,
For Attorney-General of the United States.

26 Supreme Court of the United States. October term, 1898.

WILLIAM M. STRATHER, PETITIONER,
vs.
THE UNITED STATES, RESPONDENT. No. 432.

Brief in support of petition for a writ of certiorari to the United States from the District of Columbia court of appeals.

Petitioner was convicted of murder, charged under section 5339 of the Revised Statutes of the United States, and sentenced to be hung by the neck till dead.

By the act of Congress approved January 15, 1897, entitled "An act to reduce the cases in which the penalty of death may be inflicted" (29 Stat. at Large, p. 487), it is provided, among other things, "That in all cases where the accused is found guilty of the crime of murder or rape under sections fifty-three hundred and thirty-nine or fifty-three hundred and forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life."

This case presents for construction the above-mentioned act of January 15, 1897, and this is the first time the said act has been so presented to this court. There are no adjudications of it by lower courts, except the one from which we ask that this case be certified.

27 The District of Columbia court of appeals erred in affirming a judgment based on the verdict of a jury instructed by the trial

judge prejudicial to petitioner and not permissible under a right construction of said act.

The trial judge and the District of Columbia court of appeals have administered the law of murder as though this act determined the grades of murder, while it does not, but only fixes either of two certain punishments for the same grade of murder, and leaves it entirely with the jury to determine which shall be inflicted.

The act, in relation to murder, takes from the court and imposes on the jury all discretion in the matter of sentence or penalty. The law provides either of two specific penalties for all cases of murder. The courts below have erred in holding that the penalty for murder has not been by this act changed, and in holding that not in all cases may the jury render a qualified verdict, but only in certain cases, and those cases in which there are palliating circumstances.

There is no other law like this one, and there are few decisions that throw much light on the question. Nearly all that are held to bear on the law of this case are cited in the opinion of the District of Columbia court of appeals.

In the Bram case, tried in Boston under this act, the trial judge on this point instructed the jury as follows: "But if you find the defendant guilty, the law gives you the power to add to it 'without capital punishment.' You are not required to say 'without capital punishment,' for if such be your judgment, you need make no expression in regard to it."

Persons convicted of murder anywhere in the United States except the District of Columbia may come to this court by right of appeal, but in this District there is no other way to reach this court than by
28 certiorari, a means entirely in the discretion of the court.

This case presents a situation more important than any property rights, as it involves directly the life of this petitioner and the lives of two others who are now under death sentence in the District, and who are also praying for a hearing in this court. In all Federal courts this same question is likely to arise soon, and there are now five or six men under indictment in the District of Columbia and awaiting trial, so that, as this question now presents itself to the court, it involves six or eight human lives.

The court of appeals for the District of Columbia has disposed of this momentous question by a divided court, and it seems that the Federal judge in Boston who presided at the Bram trial holds with the dissenting judge of the District court of appeals. In view of the importance of this question, the diversity of holdings below, the fact that it is desirable and advantageous to have uniform administration of this act, the probability that decision of this matter now will prevent numerous appeals and petitions to this court in like cases, and the fact that in no other manner than by petitions similar to the one in this case can persons convicted of murder in the District of Columbia be heard here, it is respectfully submitted that the prayer of petitioner for certiorari ought to be granted.

SAMUEL D. THOMPSON,
TRACY L. JEFFORDS,
Attorneys for William M. Strather.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 433.

EDWARD SMITH, PETITIONER,

vs.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

PETITION FILED OCTOBER 31, 1896.

(17018)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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a Transcript of record. Court of appeals, District of Columbia. April term, 1898. No. 797. No. 9, special calendar. Edward Smith, appellant, vs. The United States. Appeal from the supreme court of the District of Columbia. Filed May 3, 1898.

1 In the court of appeals of the District of Columbia.

EDWARD SMITH, APPELLANT,
vs.
THE UNITED STATES. } No. 797.

Supreme court of the District of Columbia.

THE UNITED STATES
vs.
EDWARD SMITH. } No. 21518. Criminal.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Filed in open court December 31, 1897. J. R. Young, clerk.

In the supreme court of the District of Columbia, holding a criminal term, October term, A. D. 1897.

DISTRICT OF COLUMBIA, *ss:*

The grand jurors of the United States of America in and for the District of Columbia aforesaid upon their oath do present—

That one Edward Smith, late of the District aforesaid, on the fifteenth day of November, in the year of our Lord one thousand eight hundred and ninety-seven, with force and arms, at and in the District aforesaid, in and upon the body of one Edmonia Jackson, she, the said Edmonia Jackson, in the peace of God and of the said United States then and there being, feloniously, wilfully, and of his malice aforethought did make an assault, and that the said Edward Smith, with a certain hatchet of the value of one dollar, which said hatchet he, the said Edward Smith, in his right hand then and there had and held, the said Edmonia Jackson, in and upon the back side of the neck of her, the said Edmonia Jackson, then and there feloniously, wilfully, and of his malice aforethought did strike, thrust, and penetrate, giving to her, the said Edmonia Jackson, then and there, by such striking, thrusting, and penetrating aforesaid with the hatchet aforesaid, in and upon the back side of the neck of her, the said Edmonia Jackson, one mortal wound of the length of three inches and of the depth of two inches, of which said mortal wound she, the said Edmonia Jackson, then and there instantly died.

2 And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Edward Smith her, the said Edmonia Jackson,

in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought did kill and murder, against the form of the statute in such case made and provided and against the peace and Government of the said United States.

SECOND COUNT.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present—

That the said Edward Smith, late of the District aforesaid, on the fifteenth day of November, in the year of our Lord one thousand eight hundred and ninety-seven, with force and arms, at and in the District aforesaid, in and upon the body of one Edmonia Jackson, she, the said Edmonia Jackson, in the peace of God and of the said United States then and there being, feloniously, wilfully, and of his malice aforethought did make an assault, and that the said Edward Smith, with a certain knife of the value of one dollar, which said knife he, the said Edward Smith, in his right hand then and there had and held, the said Edmonia Jackson, in and upon the back side of the neck of her, the said Edmonia Jackson, then and there feloniously, wilfully, and of his malice aforethought did strike, cut, and penetrate, giving to her, the said Edmonia Jackson, then and there, by such striking, cutting, and penetrating aforesaid with the knife aforesaid, in and upon the back side of the neck of her, the said Edmonia Jackson, one mortal wound of the length of three inches and of the depth of two inches, of which said mortal wound she, the said Edmonia Jackson, then and there instantly died.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Edward Smith her, the said Edmonia Jackson, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought did kill and murder, against the form of the statute in such case made and provided and against the peace and Government of the said United States.

HENRY E. DAVIS,
Attorney of the United States in and for the District of Columbia.

(Endorsed:) No. 21518. United States vs. Edward Smith. Murder. Witnesses: Thomas P. Hartigan, M. P.; A. W. Cox, M. P.; Ruth H. Taylor, Martha Williams, Emma Hutchinson. A true bill. Richard T. Fussell, foreman.

3 Supreme court of the District of Columbia.

TUESDAY, *January 11, 1898.*

The court resumes its session pursuant to adjournment, Mr. Justice Bradley presiding.

* * * * * * *

UNITED STATES *vs.* EDWARD SMITH. } No. 21518. Indicted for murder of Edmonia Jackson.

Come as well the attorney of the United States as the defendant in proper person, in custody of the warden of the jail of the District of

Columbia, and thereupon the defendant being arraigned upon the indictment, he pleads thereto not guilty, and for trial puts himself upon the country, and the attorney of the United States doth the like.

Memorandum.

1898, Feb'y 15.—Jury sworn and respited from day to day until—
1898, Feb'y 17.—Verdict: Guilty as indicted.

Supreme court of the District of Columbia.

FRIDAY, *March 4, 1898.*

The court resumes its session pursuant to adjournment, Mr Justice Bradley presiding.

* * * * * * *

UNITED STATES *vs.* EDWARD SMITH. } No. 21518. Convicted of murder of Edmonia Jackson.

Come as well the attorney of the United States as the defendant in proper person, in custody of the warden of the jail of the District of Columbia, and by his attorney, Warder Voorhees, esq.; whereupon, the defendant's motion for a new trial coming on to be heard, after argument, it is considered by the court that said motion be, and it is hereby, overruled; whereupon the attorney of the United States moves the court to pronounce the sentence of the law in this case, and it is immediately demanded of the defendant what further he has to say why the sentence of the law should not be pronounced against him, and he says nothing except as he has already said; whereupon it is considered by the court that for his said offence the said defendant be taken by the warden aforesaid to the common jail from whence he came and there to be kept in close confinement, and that on Thursday, the twelfth day of May, A. D. 1898, he be taken to the place prepared for his execution, within the walls of the said jail, and then and there, between the hours of ten (10) o'clock antemeridian and one (1) o'clock postmeridian of the same day,
4 he, the said defendant, be hanged by the neck until he be dead; and may God have mercy on his soul; and thereupon the defendant, by his attorney, prays an appeal to the court of appeals of the District of Columbia, which is allowed by the court.

Filed Mar. 5, 1898. J. R. Young, clerk.

In the supreme court of the District of Columbia.

THE UNITED STATES *vs.* EDWARD SMITH. } No. 21518. Criminal.

The President of the United States to Henry E. Davis, Attorney of the United States in and for the District of Columbia, greeting:

You are hereby cited and admonished to be and appear at a court of appeals of the District of Columbia, upon the docketing the cause therein

under and as directed by the rules of said court, pursuant to an appeal noted in open court, of the supreme court of the District of Columbia, on the 4th day of March, 1898, wherein Edward Smith is appellant and the U. S. is *are* appellee, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 5th day of March, in the year of our Lord one thousand eight hundred and ninety-eight.

[Seal supreme court of the District of Columbia.] JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 5th day of March, 1898.

HENRY E. DAVIS,
Attorney for Appellee,
Per LASKE.

Memorandum.

1898, March 28.—Leave to defendant to prosecute appeal without bond.

Filed April 27, 1898. J. R. Young, clerk.

In the supreme court of the District of Columbia.

THE UNITED STATES OF AMERICA
vs.
EDWARD SMITH. } Criminal. No. 21518.

Defendant's bill of exceptions.

At the trial of this cause, before the Honorable Andrew C. Bradley and a jury, the prosecution offered and gave evidence tending to show that on Friday, November 19, 1897, a police officer found the dead body of Edmonia Jackson, a colored woman about thirty-three years of age, in the ground-floor front room of premises No. 124 Madison alley, NW., in this city; that the body at that time was lying crosswise of a bed in the corner of the room; the mattress on the bed was saturated with blood, and there was a pool of blood on the floor; that on the floor by the bed was found a hatchet covered with blood and containing some particles of hair of a colored person; that at the autopsy, which was performed the next day, it was developed that the body was in a condition that indicated the woman had been dead four or five days; that there was a transverse incised wound in the throat, about four inches long, not very deep, evidently made with a sharp instrument, and two wounds in the back of the neck, to the right, the upper one immediately below the base of the skull, partly separating the skull from the vertebral column, so that the finger could be introduced through the wound into the cavity of the skull, the other, about an inch below the first, similar to it in character, and extending to the vertebral column; that these wounds had the appearance of having been made with a hatchet, and were both fatal wounds; that there was in the palm of the right hand a smooth cut, about two inches long, in which there was embedded

a portion of a blade of a shoemaker's knife; that the portion of the knife blade found in the wound fitted a broken knife found in the defendant's room.

The Government further offered evidence tending to prove that the premises 124 Madison alley were rented by the woman Edmonia Jackson, who lived there with her husband; that the defendant rented from her the ground-floor room; that some time before the homicide, Smith and Edmonia's husband had a quarrel about her and were both arrested upon charges of assault; that Jackson was convicted and sentenced to six months in jail; that Smith demanded a jury trial and had his case postponed from time to time, but was finally tried in August; that the night before he was tried he threatened to kill Edmonia if she ever resumed living with her husband; that the next day Smith was convicted in the police court of assault and sentenced to three months in jail; that during the time Smith and Jackson were in jail together Edmonia frequently visited the jail to see her husband; that Smith saw her on those occasions, and to other prisoners in the jail said he would fix her when he got out; that it would be another case of Strather (referring to a prisoner who was then in jail for killing a woman with a hatchet); that when his term expired on the tenth of November some of the prisoners bid him good-bye, and he said they need not do that because he would be back in a few days, but would be on the other side of the jail (referring to the side where serious offenders were held); that Smith upon being released went to 124 Madison alley and resumed living in his room; that on Saturday, the 13th of November, Edmonia wanted to go to the jail to see her husband and Smith prevented her from going; that on Monday, the 15th, he forbid her to go to the jail and waited around the house until he supposed it was too late for her to go; that after he left Edmonia went to the jail with Martha Williams, a roomer in her house, and did not return until about four o'clock; that Smith came in soon after
6 they returned and accused Edmonia of having been to the jail; that she denied it; that he refused to accept her denial and asked others about the house if she had been to the jail, and was not satisfied with their assurances that she had not; that Edmonia went down to Smith's room about five o'clock, and he was quarrelling with her there; that between six and seven o'clock he and Edmonia were on the front steps of the house and went into the house through the front door, which led into Smith's room; that they were quarreling then; that Edmonia was not seen alive after that; that about twelve o'clock that night the neighbors in 126 Madison alley heard a heavy sound, as if of someone falling, and soon after heard the front door of 124 open and someone pass up the narrow alleyway between 124 and 126, go into the back yard of 124, and turn on the water at the hydrant; that about fifteen minutes later the water was turned off and someone came back down the alleyway and went into 124 through a door that opened into the alleyway; that on Tuesday, the 15th, Smith told Martha Williams that Edmonia had left the house about ten o'clock that morning to go to a service place; that on Wednesday he told Martha, when she asked him at what number Edmonia was working, that he did not know; that it was on Eleventh street; that he was going up there that night to see Edmonia and would tell her the next day the number; that on Thursday he told her Edmonia

was living at 1115 Eleventh street; that she went there to see Edmonia, but found she was not there; that she saw Smith that evening and asked him why he had sent her to 1115 Eleventh street, and he told her she made a mistake; that she should have gone to 1135 Eleventh street, but told her that it was not necessary for her to go there; that Edmonia would be home that night; that she went and found that Edmonia was not at 1135; that Smith was about the premises, 124 Madison alley, every day from Monday until Friday, and was there every night; that on Wednesday night, the 17th, Smith was at the corner of 2nd and F streets, under the influence of liquor; that a neighbor met him and walked home with him; that he had some trouble opening the door; that his neighbor took the key, opened the door leading into the room where Edmonia's body was found, and offered to go into the room with Smith, and Smith refused to permit him to enter; that both doors leading into Smith's room were kept locked; that after his arrest Smith told conflicting stories to the officer of his whereabouts from Monday to Friday; that after his return to the jail Smith stated to a prisoner there that he killed the Jackson woman; and there the prosecution rested.

And thereupon the defendant, to maintain the issue on his part joined, offered and gave evidence tending to show that Mrs. Jackson had not visited the jail at the time prisoners at the jail said she was there, at which times they testified Smith made threats against her; and there the defendant rested.

And thereupon the court, of its own motion, charged the jury as follows:

7 The charge made by the indictment, which is merely a charge, gentlemen of the jury, is that Edmonia Jackson was murdered by the defendant.

Murder, expressed and defined briefly, is the unlawful killing of a human being with malice aforethought. An unlawful killing is a killing that is not justified or excused by law. A lawful killing, for instance, is an execution pursuant to the sentence of a court. It may be a killing in battle or it may be a killing in self-defence.

Malice must be found in the evidence to make out the crime to be murder. That malice may be ascertained and found either in threats or declarations of intention to kill, or it may be presumed from the character of the act and the instrument that was used in accomplishing the death of the victim.

Inasmuch as the use of a deadly weapon may and likely will accomplish death, the law presumes that a man using a deadly weapon in such manner as that it may occasion death intends the natural consequences of his act, and that if death results from such a use of a deadly weapon the party so using the deadly weapon intended to accomplish the death.

A hatchet, used upon the back of the neck, making such wounds as the testimony indicates occasioned the death of Edmonia Jackson, is a deadly weapon. The presumption of the law is that whoever made those wounds upon the back of the neck of that woman made them maliciously.

It appears by the evidence that Edmonia Jackson was killed by two deep wounds that were made in the back of her neck, either one of which was sufficient to have caused death. There is no explanation in the tes-

timony or in the evidence of the circumstances that immediately attended the infliction of those wounds, and you are left only to inferences from the testimony as to matters that preceded the act which accomplished the death of this woman, and to other circumstances that are given in evidence, which followed her death.

No testimony has been offered tending to show that this woman was slain by any person in self-defence. No testimony has been offered tending to show that this woman was slain by anyone in the heat of passion, excited by reasonable provocation. So that you are left to judge of the character of the act that accomplished her death solely by the circumstances that are evidenced by the surroundings of her body and by the nature of the wounds that were inflicted.

The testimony tends to establish the claim of the Government that this woman was murdered. There is no other explanation of her death. The presumption is that it is a case of murder by someone, for there is, as I have said, no explanation of the fact except that explanation which the body of the woman and her surroundings tend to give.

If that be so, and you reach the conclusion that this woman was murdered by some one, the only other inquiry in the case is whether the testimony and the evidence that has been adduced leads you to believe beyond a reasonable doubt that the defendant perpetrated the act.

8 It is not my function nor my purpose at this time to attempt to rehearse the evidence. I shall make no comment upon it. I shall leave it entirely with you, gentlemen of the jury, for you are the sole and exclusive judges of the weight and credibility of the testimony. Much of this testimony is circumstantial; so is much of the testimony in any criminal case. You should not convict this defendant unless you are satisfied and convinced of his guilt; and if, after weighing and considering all the evidence in the case, you have a reasonable doubt of his guilt, you should give him the benefit of that doubt, and return a verdict of not guilty, for the law presumes that every person who is charged with crime is innocent, and it is the duty of the Government and the burden rests upon the prosecution to offer sufficient testimony to convince the minds of the jury and to lead them to believe beyond a reasonable doubt that the defendant is guilty, otherwise this presumption of innocence must prevail, and the only proper verdict would be one of "not guilty."

The question for you to determine is whether all of these circumstances, taken together, convince you that the defendant perpetrated this act.

I have been asked to instruct you, and I so do, that if the circumstances are consistent with any other reasonable hypothesis than the guilt of the defendant, he should not be convicted. But if the reasonable hypothesis of all these circumstances is consistent, and consistent only, with the guilt of the defendant, and if, after considering and weighing all of the evidence, all of these circumstances, you are led to the conclusion, to the conviction, of the guilt of the defendant, your verdict should be, "Guilty as indicted."

[Under a recent statute the jury are authorized, in returning a verdict of guilty of murder, if the evidence justifies them on their consciences in so doing, to qualify the verdict by the addition of the words "without capital punishment."

The law inflicting the penalty of death for murder has not been repealed. That is the penalty which the law fixes. You are not responsible for that penalty; neither am I. The existence of that law is well known to the community. The man who violates the law by committing murder should anticipate the infliction of the death penalty. In so perpetrating murder, he must do it with his eyes open to the consequences. The legislature probably intended that in cases where there were some mitigating or palliating circumstances, where it was apparent from the evidence that the crime was not the most heinous crime of murder, or where there was doubt whether the circumstances indicated premeditation, perhaps, that the jury might qualify their verdict by adding the words "without capital punishment." But it was evidently contemplated by Congress that there would be cases in which juries would not be justified in so qualifying their verdicts, and therefore the law remains, and unless the verdict is so qualified the penalty of the law is unchanged.]

Now, as I have intimated to you, gentlemen of the jury, you are
9 not responsible for the law; neither are you responsible for the act of an individual who brings himself within the pale of the law. If a man makes his bed, he must lie in it. It behooves you and me as officers of the law to do our duty to the man on trial; to see that he is not unjustly convicted; to see that he has the benefit of the presumption of innocence, and to see that he has the benefit of a reasonable doubt if, after the consideration of all the circumstances, you find that there is any reasonable doubt existing in your minds of his guilt; but the duty also rests upon you to see to it that if you find that the defendant is guilty, you will vindicate the law and uphold it by returning a verdict of "Guilty as indicted." Whether you qualify it or not is a matter for you to determine. If you conclude to qualify it, it must be by the unanimous decision of the twelve jurors.

Take the case, gentlemen.

Whereupon the defendant, by his counsel, then and there excepted to that part of said charge which related to the act of Congress, approved January 15th, 1897, entitled "An act to reduce the cases in which the penalty of death may be inflicted," and which is enclosed in brackets above, and the trial justice noted the said exception upon his minutes before the jury retired to consider of its verdict.

And because the aforesaid exception, made and noted as aforesaid, does not appear of record, the defendant, by his counsel, prays the trial justice to sign, seal, and enrol' this his bill of exceptions, which is accordingly done, now for then, this 26th day of April, A. D. 1898.

A. C. BRADLEY, *Justice.* [SEAL.]

Supreme court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 15, inclusive, are true copies of originals in cause No. 21518, criminal, The United States vs. Edward Smith, as the same remains upon the files and records of said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 29th day of April, A. D. 1898.

JOHN R. YOUNG, *Clerk.*

[Seal supreme court of the District of Columbia.]

(Endorsed on cover:) District of Columbia supreme court. No. 797. Edward Smith, appellant, vs. The United States. Court of appeals, District of Columbia. Filed May 3, 1898. Robert Willett, clerk.

10 TUESDAY, *May 17th, A. D. 1898.*

WILLIAM M. STRATHER, APPELLANT, *vs.* THE UNITED STATES; } No. 795.

and

EDWARD SMITH, APPELLANT, *vs.* THE UNITED STATES; } No. 797.

and

CHARLES WINSTON, APPELLANT, *vs.* THE UNITED STATES. } No. 804.

The argument in the above-entitled causes was commenced by Mr. B. T. Roodhouse, attorney for the appellant in No. 795, and was continued by Mr. George Kearney, attorney for the appellant in No. 804, and by Mr. Warder Voorhees, attorney for the appellant in No. 797, and by Messrs. John E. Laskey and D. W. Baker, attorneys for the appellee, and by Mr. Charles H. Turner, attorney for the appellant in No. 804, and was concluded by Mr. Samuel D. Truitt, attorney for the appellant in No. 795.

11 EDWARD SMITH, APPELLANT, *vs.* THE UNITED STATES. } No. 797.

Mr. Chief Justice Alvey delivered the opinion of the court:

Edward Smith was indicted on the 31st of December, 1897, for the crime of murder. The crime is alleged to have been committed on the 15th of November, 1897. The indictment charges that the accused wilfully and feloniously, with malice aforethought, on the date just mentioned, caused the death of one Edmonia Jackson by blows and wounds inflicted by a hatchet. To the indictment the accused pleaded not guilty, and, upon trial, he was found guilty of murder as indicted, by the verdict of a jury. He was thereupon sentenced to be hung, and he has appealed.

The facts of the case are not conflicting, but they are not material to be recited for the decision of the question presented on this appeal. The only question raised by exception is one upon the charge to the jury, whereby the judge below instructed the jury as to the construction and effect of the act of Congress of January 15, 1897, entitled "An act to reduce the cases in which the penalty of death may be inflicted," and as

to the circumstances under which it would be proper or improper for the jury to return a qualified verdict under the statute. The jury were expressly informed by the judge that the question whether the verdict should be a qualified one under the statute or not was a matter alone for their determination; "that the jury were authorized, in returning a verdict of guilty of murder, if the evidence justified them on their consciences in so doing, to qualify the verdict by the addition of the words 'without capital punishment.'"

Whether the court has the right to advise the jury as to the circumstances under which the qualified verdict should or should not be rendered, or whether the jury should be left without instruction, with an unquestioned option to return a verdict of guilty of murder as indicted, or guilty "without capital punishment," in any and all cases, without any reference whatever to the facts and circumstances of the case, is a question that this court has fully considered in the preceding case of Strather v. United States, and our decision in that case fully embraces and disposes of the question raised by the exception in this case. We shall, therefore, following the decision in the preceding case of Strather, affirm the judgment appealed from in the present case; and it is so ordered.

Judgment affirmed.

12 WILLIAM M. STRATTHER, APPELLANT, *vs.* THE UNITED STATES; No. 795.

and

EDWARD SMITH, APPELLANT, *vs.* THE UNITED STATES; No. 797.

and

CHARLES WINSTON, APPELLANT, *vs.* THE UNITED STATES. No. 804.

Dissenting opinion by Mr. Justice Shepard.

I am unable to concur with my brothers in their construction of the act of Congress which provides that when an accused person shall be found guilty of murder "the jury may qualify their verdict by adding without capital punishment."

In my opinion, the language of the act is plain and affords no room for construction—for appeal from its letter to its spirit.

Public policy in respect of the punishment of offenses is a matter within the exclusive control of Congress, and departures therein, whether to be regarded as wise or unwise, must be given effect to as declared.

To my mind it appears plain that whilst Congress did not abolish capital punishment for the crime of murder, it nevertheless committed the matter of its infliction to the uncontrolled discretion of the jury in each case.

If it had been intended that the exercise of this power of commutation of the death penalty should depend upon the court or upon the jury, subject to the advice and admonition of the court, I think it would have been expressly so declared.

Whether, in the exercise of an unlimited discretion, juries may or may not make distinctions between criminals not justified by the conditions of their respective cases, or, in practice, virtually abolish the death penalty, is wholly beside the question. In the exercise of its own undoubted discretion in the premises, Congress has seen proper to commit the power to the jury, and to the jury alone.

13 In construing the statute to mean that the court may, without error, admonish the jury in respect of the grounds upon which they may commute the death penalty by the addition to their verdict, it is not denied that he is compelled also to instruct them that it is their privilege to exercise the power notwithstanding.

With such instructions as were given in this case, no jury, composed of good citizens, accustomed, as it is their duty, to accept and apply the law as given them in charge by the court, could have extended clemency to any one of these appellants.

After such an admonition to such a jury, the further information that they might nevertheless commute the punishment was but a meaningless formality. It did not give the accused the benefit of the statute.

I can not accept as sound the argument that the purpose of Congress in this enactment was substantially the same as shown in the legislation of the States, whereby the offense of murder has been divided into two degrees—murder of the first and murder of the second degree.

On the contrary, it seems to me that there is a substantial difference of purpose. Under the State statutes referred to, murder of the first degree consists of homicide committed in the perpetration of offenses like rape, robbery, arson and burglary, or by poison, starvation, torture, and so forth, showing express malice. All murder not included in the definition of the first is murder of the second degree.

In the enforcement of those statutes the courts are required to declare the law to the jury in application to the facts. Where the evidence shows plainly that the accused, if guilty at all, is guilty of murder of the first degree and nothing less, it is the duty of the court to withhold from the jury the privilege of returning a verdict of guilty of murder of the second degree. The court is not required to submit the question of the degree of guilt to the jury, regardless of the evidence, as under the act of Congress it is compelled to extend to them the privilege of commuting the death penalty.

If the purposes of the two sets of statutes are the same, it would be more reasonable to hold that, under the act of Congress, the right to commute the death penalty should not be accorded to the jury at all, unless the evidence should discover something tending to warrant the exercise of clemency.

For the reasons given, I am of the opinion that the judgment in each case should be reversed.

14 Court of appeals of the District of Columbia. April term, 1898.

EDWARD SMITH, APPELLANT,
vs.
THE UNITED STATES. } No. 797.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed.

Per Mr. Chief Justice Alvey, June 7, 1898.

Dissenting, Mr. Justice Shepard.

(Indorsed:) Court of appeals of the District of Columbia. April term, 1898. No. 797. Judgment. Court of appeals, District of Columbia. Filed June 7, 1898. Robert Willett, clerk.

15 Court of appeals of the District of Columbia.

I, Robert Willett, clerk of the court of appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 14, inclusive, contain a true copy of the transcript of record and proceedings of said court of appeals in the case of Edward Smith, appellant, vs. The United States, No. 797, April term, 1898, as the same remain upon the files and records of said court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said court of appeals, at the city of Washington, this 8th day of October, A. D. 1898.

[SEAL.] ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

(Indorsement on cover:) Case No. 17018. District of Columbia court of appeals. Term No., 433. Edward Smith, petitioner, vs. The United States. Filed October 11, 1898.

15624

1 In the Supreme Court of the United States. October term, 1898.

EDWARD SMITH, PETITIONER AND PLAINTIFF IN ERROR,
vs.
THE UNITED STATES, DEFENDANT IN ERROR. } No. 433.

Petition for the writ of certiorari to the court of appeals of the District of Columbia.

To the honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Edward Smith, respectfully represents:

That he is a citizen of the United States and the District of Columbia. In the October term for 1897 of the supreme court of said District the grand jurors of the United States of America in and for the District of Columbia, upon their oaths did present an indictment charging him with the crime of murder of one Edmonia Jackson on the fifteenth day of November, in the year of our Lord eighteen hundred and ninety-seven. Upon arraignment your petitioner plead "Not guilty," and, after trial and conviction and a motion for a new trial being overruled, was, on March 4th, 1898, by the supreme court of the District of Columbia, holding a criminal term, sentenced to be hanged. At the trial an exception was noted by the defense to a certain portion of the court's charge, relative to a recent act of Congress entitled "An act to reduce the cases in which the
2 penalty of death may be inflicted," being chapter 29 of the acts of the second session of the Fifty-fourth Congress, approved January 15, 1897, and which is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where the accused is found guilty of the crime of murder or of rape under sections fifty-three hundred and thirty-nine or fifty-three hundred and forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life.

"SEC. II. That except offenses mentioned in sections fifty-three hundred and thirty-two, thirteen hundred and forty-two, sixteen hundred and twenty-four, fifty-three hundred and thirty-nine, and fifty-three hundred and forty-five, Revised Statutes, when a person is convicted of any offense to which the punishment of death is now specifically affixed by the laws of the United States, he shall be sentenced to imprisonment at hard labor for life; and when any person is convicted of an offense to which the punishment of death, or a lesser punishment, in the discretion of the court, is affixed, the maximum punishment shall be imprisonment at hard labor for life.

"SEC. III. That the punishment of death prescribed for any offense specified by the statutes of the United States, except in sections fifty-three hundred and thirty-two, thirteen hundred and forty-two, sixteen hundred and twenty-four, fifty-three hundred and thirty-nine, and fifty-three hundred and forty-five, Revised Statutes, is hereby abolished, and all laws and parts of laws inconsistent with this act are hereby repealed.

"SEC. IV. That nothing herein contained shall apply to or in any way affect any proceeding or indictment now found or pending or that may be found for any offense committed before the passage of this act, and all offenses committed before the passage of this act shall be punished by the laws then in force: Provided, That juries may return qualified verdicts in such cases according to the provisions of section one of this act, and sentences shall be imposed as therein provided.

"SEC. V. That any Indian who shall commit the offense of rape within the limits of any Indian reservation shall be punished by imprisonment at the discretion of the court. So much of the ninth section of chapter three hundred and forty-one of the acts of the year eighteen hundred and eighty-five as is inconsistent herewith is herewith (sic) repealed." 29 Statutes at Large, 487.

The trial court in instructing the jury of their right under this act said, in part, as follows:

"Under a recent statute the jury are authorized, in returning a verdict of guilty of murder, if the evidence justifies them on their con-
3 sciences in so doing, to qualify the verdict by the addition of the words 'without capital punishment.'

"The law inflicting the penalty of death for murder has not been repealed. That is the penalty which the law affixes. You are not responsible for that penalty; neither am I. The existence of that law is well known to the community. The man who violates the law by committing murder should anticipate the infliction of the death penalty. In so perpetrating murder he must do it with his eyes open to the consequences. The legislature probably intended that in cases where there were some mitigating or palliating circumstances, where it was apparent from the evidence that the crime was not the most heinous crime of murder, or where there was doubt whether the circumstances indicated premeditation, perhaps, that the jury might qualify their verdict by adding the words 'without capital punishment.' But it was evidently contemplated by Congress that there would be cases in which juries would not be justified in so qualifying their verdict, and therefore the law remains, and unless the verdict is so qualified the penalty of the law is unchanged."

To this part of this instruction, as before said, exception was duly taken at the time by the defense, and upon appeal to the court of appeals of the District of Columbia on this exception, as appears in the bill of exceptions (see record, page 8, of the court of appeals), it was argued that the trial court erred, because section one of the above-mentioned act of January 15, 1897, gave the jury the sole power to qualify their verdict or not, as they might think proper, in ALL cases. That the only duty the trial court had to perform was to inform the jury of the existence of said act and its provisions, leaving it entirely to the discretion of the jury whether they should qualify their verdict or not.

The attention of the court of appeals was called to the case of Spain vs. The State (59 Miss., 19, 24), where the court, passing upon the same question under a similar act of their legislature, said:

"The judgment must be reversed, because of the second instruction given at the instance of the State. It limits and qualifies the right of the jury to affix the punishment at imprisonment for life, whereas the

law confers on the jury this right without qualification or restric-
4 tion. The right of the jury to fix the punishment as indicated is without any condition. The most atrocious crime committed under the most aggravating circumstances may be punished by imprisonment for life instead of by death, if the jury so determine by its verdict. The law demands a jury willing to be the instrument of visiting the penalty of death, and confers on such a jury the unconditional right to fix the punishment at imprisonment for life. It was erroneous to instruct the jury that its right was dependent on any state of the evidence or any view it might take of it."

The instruction complained of in this case was as follows:

"If the jury simply find the accused guilty as charged in the indictment, it will be the duty of the court to pronounce the death penalty; but, if the evidence in the case warrants them in so doing, they may find him guilty as charged, 'and declare that the punishment to be inflicted shall be imprisonment in the penitentiary for life,' or they may find the defendant not guilty."

There are similar statutes to the act of January 15, 1897, now in question, in the following states: Alabama, California, Georgia, Illinois, and Mississippi.

ALABAMA.

The Alabama statute prescribes as follows:

"Any person who is guilty of murder in the first degree must, on conviction, suffer death, or imprisonment in the penitentiary for life, at the discretion of the jury." (Alabama Criminal Code, section 3729.)

In the case of Brown vs. The State, 109 Alabama, pages 80 to 84, inclusive, the court was called upon to decide the same question as the one at issue, the trial court having instructed the jury in part as follows:

"While the jury are invested by the law with this discretion, the court charges you that it is a legal discretion, one which is a duty devolved upon the jury by the law, to be exercised as a grave and solemn duty; and the jury in so determining the punishment may consider the character of the offense and the circumstances of its commission, if it was committed by the defendant, and all the facts connected with or attendant upon the occurrence as shown by the evidence; and should then determine from a sense of duty which of the punishments, so left to their discretion by the law, is proper in the case and is best calculated to deter others."

5 The supreme court of Alabama, in reviewing this instruction, said:

"The true interpretation of this instruction, that which it was intended the jury should adopt and by their verdict effectuate, is that death should be affixed as the punishment, unless they found in the facts and circumstances of the case some special or peculiar reason for fixing the milder punishment. * * * The instruction is not only erroneous in its construction of the statute to which it refers, but is an invasion of the province of the jury. * * * There is no more marked characteristic of the reformation of our criminal law, wrought and intended to be wrought by our penal code and its successors, than the abolition of capital punishment.

"It is never visited except by a jury on their own responsibility, controlled only by their own consciences, and it is not contemplated that the suggestion of their consciences shall be directed by the judge presiding. * * * The discretion is legal in the sense that it is derived from and conferred by law. But it is not of the nature of a judicial discretion, which is said to be controlled by fixed legal principles.

"If such had been the discretion the lawmakers contemplated it is but a just presumption that judges, not juries, would have been clothed with it. The lawmakers were not unmindful of the constitution of juries, nor of the varied considerations, thoughts, and sentiments which will govern them, the indulgence of which there is no purpose to forbid. It must have been foreseen and anticipated that there would be jurors reluctant to inflict capital punishment. * * * The presiding judge performs his whole duty when he informs the jury that the law commits to them the selection of the punishment which must follow conviction. The idea which seems to be shadowed out, if it is not distinctly expressed in the instruction, is that it is the duty of the jury to impose the graver punishment unless they find some reason in the peculiar facts of the particular case for the imposition of the milder punishment."

In this last case, however, it seemingly appears, although these words are those of the justice delivering the opinion of the court, and the only opinion delivered, that in this particular point the majority of the court did not agree, for which reason the case was cited by the Government at the hearing in the court of appeals. Upon this case your petitioner has more to say, if your honors will grant him the writ here prayed for, only citing the case now as it very clearly argues his side of the question.

The California statute prescribes:

"Every person guilty of murder in the first degree shall suffer death, or confinement in the State prison for life, at the discretion of the jury trying the same; or, upon a plea of guilty, the court shall determine the same." (Sec. 190, Penal Code, as amended March 28, 1874.)

Under this enactment there have been many decisions by the supreme court of California, and of the most important shortly, as follows:

The first is that of the People vs. Welch (49 California, 179), where the court says:

"Here their discretion is limited, at most, to determining which of two punishments shall be inflicted; and we think that it is still more restricted, and is to be employed only where the jury is satisfied that the lighter penalty should be imposed."

Nevertheless, your honor's attention is respectfully called to the fact that it is not here laid down by what rule the jury is to be governed in their judgment, leaving it entirely with them to decide, in the exercise of their unlimited discretion. For the court further says:

"It would seem that, in view of the apparently growing disinclination to find verdicts of murder in the first degree, when the necessary result was capital punishment, and the existence of a feeling that there were nicer distinctions in the degree of malignancy exhibited in murders than were made by the letter of the statute definitions, the legislature intended

to give to the jury, when the verdict was murder of the first degree, the power of relieving the defendant of the extreme penalty and of substituting another punishment in its stead. * * * We may say * * * that it was the purpose of the legislature, by amendment of section 190, to permit the jury, in a case where the facts proved brought the crime of the defendant within the statutory definition of the higher offense, but they believed the punishment of death too severe, to declare that he should be imprisoned for life."

It is respectfully submitted, where the jury is allowed to qualify its verdict "in a case where the facts proved brought the crime of the defendant within * * * the higher offense" (first-degree mur-
7 der), their judgment certainly could not be in any way governed by mitigating or palliating circumstances; but, on the other hand, permission to so qualify their verdict, without any rule laid down with regard thereto, was a permission to do so in all cases at their discretion.

The next cases are the People vs. Jones, 63 California, 169; People vs. Murdock, 64 California, 371; People vs. Brick, 68 California, 190, and People vs. Olsen, 80 California, 128. All of these last-mentioned cases are short and ill considered, basing their judgments, as they state, on the case of People vs. Welch, 49 California, 179, first above considered. While they seemingly hold contra to our contention, still, if their authority is the case of the People vs. Welch, this is impossible, as we have, in our consideration of that case, endeavored to show. Again, in the People vs. Murdock, 64 California, 371, the court said:

"With this power of discretion a court can not interfere. The jury should be left entirely free to act according to their judgment."

Notwithstanding this last expression the decision of the court seems to be the other way, but as they all are so poorly considered it is not safe to place much reliance upon them.

The question was again brought up and reargued before the supreme court of California in the case of the People vs. Bawden, 90 California, 197, and the court, after some little consideration, said:

"Appellant contends for a reversal on account of the instructions given by the court. * * * By these instructions the jury were told, substantially, that if they found the defendant guilty of murder of the first degree, and also found some extenuating facts or circumstance" (which your petitioner submits is a contradiction in terms), "it was within their discretion to relieve him from the extreme penalty of death by fixing the punishment at imprisonment for life; but that if the evidence did not show such extenuating circumstance, then they should allow the
8 death penalty to be imposed. If the question here presented were a new one, there would be strong reasons for holding that by section 190 of the Penal Code the legislature intended to give to the jury the entire power of fixing the punishment in such a case, uninfluenced by the court. * * * But these instructions are literal copies of instructions given and approved by this court in People vs. Brick, 68 California, 190. * * * Therefore we decline to reopen the question, and hold that the instructions, under the authorities, were not erroneous. It is to be hoped, however, that trial courts will not make further excursions into this doubtful domain."

As to the case of People vs. Brick, referred to in this case, its authority is the case of the People vs. Welch, 49 California, above considered.

We come now to the last case on the subject decided by the California supreme court, which is that of People vs. Kamaunm, 110 California, 613. In this case the court said:

"There was no error in refusing to instruct the jury as to how they should use the discretion given them in regard to the punishment in case they found the defendant guilty. This discretion is given to the jury, and the court can not direct or advise them upon the subject further than to inform them of their function."

And to the same effect, it would seem, is the case of the People vs. Leary, 105 California, 495. We therefore submit that if ever such was the law in this State, the better judgment of that court, in the last two cases cited, has reversed the same; but we respectfully maintain that, taking the case of People vs. Welch, 49 California, 179, as the authority for all subsequent thereto, but prior to the last two cited, it can not be in truth said to have been so decided, even in California.

GEORGIA.

The Georgia statute prescribes—

"The punishment for persons convicted of murder shall be death, but may be confinement in the penitentiary for life in the following cases: If the jury trying the case shall so recommend. If the conviction is founded solely on circumstantial testimony, the presiding judge may sentence to confinement in the penitentiary for life."

9

As in California, so under this enactment there are quite a number of decisions by the supreme court of Georgia. But, before we proceed to these, there is another decision by the supreme court of this State under a similar statute which is referred to in all, or nearly all, of the cases under the enactment above set out. It is the case of Johnson vs. State, 58 Ga., 491, which was a prosecution for the larceny of a cow and is punished under the Georgia statutes by confinement in the penitentiary from two to four years, "unless the jury trying the case shall recommend the prisoner to mercy; in which event he shall be punished * * * not more severe than the chain gang; fine of a thousand dollars and imprisonment six months." The court in this case, 58 Ga., 491, says:

"So that a recommendation to mercy grades this offense as less than felony, keeps the prisoner out of the penitentiary, and is a great right to which the defendant is entitled by law. What is that right? It is a right for the jury to say whether he shall be sent to the penitentiary or not. Under what circumstances? Under all circumstances. The law does not limit it to a case of mitigating circumstances or any peculiar circumstances whatever. * * * It is lodged, too, by the general assembly, whether wisely or not we are not called upon to say, in the jury, and not in the judge.

"Ordinarily, punishment, its degree and extent, is vested in the court, * * * but the statute in these offences, vests it in the jury, to the extent of saying that this man shall not go to the penitentiary. Whether they ought not to be merciful, is for them to say, independently of directions from the court as to the circumstances which would justify them in so saying."

The first case under the Georgia statute in regard to murder is that of Hill vs. State, 72 Ga., 132, where the supreme court said:

"The court below instructed the jury, 'If you find this defendant guilty, then you have a right, under our law, either to find him guilty without recommendations, or you have the right, if you find him guilty, to recommend that he be punished by imprisonment in the penitentiary for life. If you find him guilty, it is for you to consider the case and say whether it is a proper case for that or not. You are not to be governed in that instance by your sympathies, but by your judgment, to say whether or not it is such a case as it ought to be done. You must be governed by your judgment, approved by the evidence * * * in the case and the law applicable to it, and then say what is your duty as twelve upright sworn jurors.' * * * This statute leaves it in the discretion of the jury as to whether they will recommend imprisonment for life in the penitentiary of a person convicted of murder; it is not limited or circumscribed in any respect whatever. This law does not prescribe any rule by which the jury may or ought to exercise this great discretion; it does not say that the jury are not to be governed by their sympathies, and that they are to be governed by their judgment, as instructed by the court below. The court below imposed, by its charge, restrictions upon the jury unauthorized and unwarranted by the statute."

In the next case, Inman vs. State, 72 Ga., 280, the instructions of the lower court were similar to those in the case last cited, but the Supreme Court on review saw a distinction, holding as follows:

"We do not think that the language used by the court was calculated to deprive, circumscribe, or restrict the jury in the exercise of their rights to recommend that the accused be imprisoned for life in the penitentiary; in this respect it differs from Hill vs. State decided at the last term of the court.

Yet, we think in cases like this the better practice would be for the court to call the attention of the jury to the law, and merely state to them, if they thought proper they might, in addition to the verdict of guilty, recommend that the defendant be imprisoned in the penitentiary for life. This was substantially done by the court in this case."

So, too, in the next case, Valentine vs. State, 77 Ga., 481, the court says:

"The distinction taken between the case of Hill vs. State and Inman vs. State also exists here," and further on, referring to the case of Johnson vs. State, 58 Ga., 491, says:

"Moreover, the charge in that case confined the right of the jury in this, that the court charged that if there were no circumstances to justify you in recommending him to the mercy of the court, 'Why, then, you ought not to do it.' Such a charge as that would be error under the statute in respect to punishment for murder, because it said to the jury that they ought not to recommend to mercy unless such and such was proved."

And in the last case in Georgia, i. e., Thomas vs. State, 89 Ga., 480, it is held that "Such recommendation is in all cases matter of discretion with the jury."

ILLINOIS.

The statute in this State prescribes:

"Whoever is guilty of murder shall suffer punishment of death, or imprisonment in the penitentiary for his natural life, or for a term not less than fourteen years. If the accused is found guilty by a jury, they shall fix the punishment by their verdict.

In the two Illinois decisions under this act, Nowacryk vs. State, 139 Ill., 336, and Fletcher et al. vs. State, 117 Ill., 184, the question was whether testimony of mitigating facts could be given in evidence by the accused in order that the jury might qualify their verdict, and the supreme court of that State very properly held that although the character of the testimony was such as to render it inadmissible at the trial under common-law rules, still under the act it was proper for the purpose of allowing the jury to qualify their verdict if they deemed proper.

It is submitted that it is too plain for argument such a ruling goes no further than for the benefit of the accused and can not be construed e converso to preclude the jury from qualifying their verdict in a case where there may not be such evidence. For in the case of Fletcher vs. State, 117 Ill., 184, above cited, the court says:

"In the contemplation of this statute there may be every technical element of murder existing and yet the circumstances be such that the jury would be justified in imposing punishment by confinement in the penitentiary for fourteen years only."

12 MISSISSIPPI.

The Mississippi decisions have been considered, so we will not consider them here.

UTAH.

In Utah a somewhat similar statute prevails, i. e.:

"Every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the court."

Having examined all the decisions of the various States under similar statutes, we have reserved for the last the decision of this honorable court cited and relied upon by the Government in its brief before the court of appeals, viz: Calton vs. Utah, 130 U. S., 86.

That decision was simply this: The trial court went to the other extreme, and did not so much as inform the jury that such a statute existed, or of their rights under it, and of course your honors held it error. We wish to direct your attention to what this court said in that case as holding, we submit what your petitioner contends:

"The statute evidently proceeds upon the ground that there may be cases of murder in the first degree, the punishment for which by imprisonment for life at hard labor will suffice to meet the ends of justice."

Your petitioner submits nothing is said here about mitigating circumstances, but on the other hand the jury are restricted, if at all, only to that which "will suffice to meet the ends of justice," leaving it to them

to say what will in each case accomplish this. Proceeding, this court says:

13 "The jury to whom the statute commits the determination of that question, at least in part, were not informed of their duty and responsibility." Here it is desired to direct your honors' attention to the provision in the Utah statute which places the punishment, even after a recommendation by the jury, "at the discretion of the court." Can it not be inferred from this language of your honors, had the Utah statute been as the one in question, with no discretion in the court upon a recommendation by the jury, this court would have construed that statute to have committed the determination of the punishment to the jury not "at least in part," but in the whole, and that the statute under consideration should be so construed?

Upon the following cases the court of appeals bases its opinion and judgment: People vs. Welch, 49 Cal., 179; People vs. Brick, 68 Cal., 190; People vs. Bawden, 90 Cal., 195; Brown vs. State, 109 Ala., 70; Inman vs. State, 72 Ga., 269; Valentine vs. State, 77 Ga., 483; Nowacryk vs. State, 139 Ill., 336, saying: "Those statutes" (statutes of various States) "have been sonstrued and applied, under the direction of the courts, in the same manner that the act here in question has been construed and applied by the court below, in the charge given the jury. In all these cases, upon statutes substantially similar to the act of Congress here involved, the courts have held that the degree of punishment should be determined with reference to the special facts and circumstances of the case."

Your honors' attention is respectfully invited to the fact that there is not one of these cases but which has been examined in this petition, and upon this examination we submit we have shown that the majority of the court of appeals of the District of Columbia is mistaken in their understanding of the decisions in the various States.

14 In closing, your petitioner respectfully submits that the question here presented is one of peculiar gravity, general importance, and upon which there is a conflict of opinion.

Of peculiar gravity, for it involves the question of life or death.

Of general importance, for it affects all prosecutions either for murder or rape in all the courts of the United States.

Upon which there is a conflict of opinion, because even in the decision of the court of appeals of the District of Columbia here complained of Mr. Justice Shepard, of that court, in a very able opinion, dissents as follows:

"I am unable to concur with my brothers in their construction of the act of Congress which provides that when an accused person shall be found guilty of murder the jury may qualify their verdict by adding, 'without capital punishment.'

"In my opinion the language of the act is plain and affords no room for construction—for appeal from its letter to its spirit.

"Public policy in respect of the punishment of offenses is a matter within the exclusive control of Congress, and departure therein, whether to be regarded as wise or unwise, must be given effect to as declared.

"To my mind it appears plain what whilst Congress did not abolish capital punishment for the crime of murder, it nevertheless committed

the matter of its infliction to the uncontrolled discretion of the jury in each case.

"If it had been intended that the exercise of this power of commutation of the death penalty should depend upon the court, or upon the jury, subject to the advice and admonition of the court, I think it would have been expressly so declared.

"Whether, in the exercise of an unlimited discretion, juries may or may not make distinctions between criminals not justified by the conditions of their respective cases, or, in practice, virtually abolish the death penalty, is wholly beside the question. In the exercise of its own undoubted discretion in the premises, Congress has seen proper to commit the power to the jury, and to the jury alone.

"In construing the statute to mean that the court may, without error, admonish the jury in respect of the grounds upon which they may commute the death penalty by the addition to their verdict, it is not denied that he is compelled also to instruct them that it is their privilege to exercise the power notwithstanding.

"With such instructions as were given in this case, no jury, composed of good citizens, accustomed, as it is their duty, to accept and apply the law as given them in charge by the court, could have extended clemency to any one of these appellants.

"After such an admonition, to such a jury, the further information that they might, nevertheless, commute the punishment was but a meaningless formality. It did not give the accused the benefit of the statute.

"I can not accept as sound the argument that the purpose of Congress in this enactment was substantially the same as shown in the legislation of the States, whereby the offense of murder has been divided into two degrees—murder of the first, and murder of the second degree.

"On the contrary, it seems to me that there is a substantial difference of purpose. Under the State statutes referred to, murder of the first degree consists of homicide committed in the perpetration of offenses like rape, robbery, arson, and buglary, or by poison, starvation, torture, and so forth, showing express malice. All murder not included in the definition of the first is murder of the second degree.

"In the enforcement of those statutes the courts are required to declare the law to the jury in application to the facts. Where the evidence shows plainly that the accused, if guilty at all, is guilty of murder of the first degree and nothing less, it is the duty of the court to withhold from the jury the privilege of returning a verdict of guilty of murder of the second degree. The court is not required to submit the question of the degree of guilt to the jury, regardless of the evidence, as under the act of Congress it is compelled to extend to them the privilege of commuting the death penalty.

"If the purposes of the two sets of statutes are the same, it would be more reasonable to hold that, under the act of Congress, the right to commute the death penalty should not be accorded to the jury at all, unless the evidence should discover something tending to warrant the exercise of clemency.

"For the reasons given, I am of the opinion that the judgment in each case should be reversed."

Again, your petitioner, respectfully invites your honors' attention to the further fact, that on the second trial of the case of U. S. vs. Bram,

in the circuit court of the United States for the district of Massachusetts, the justice presiding merely informed the jury of their right to
16 qualify their verdict, giving no instruction as to what should influence their judgment in so doing, as appears from the following:

[Boyd B. Jones, U. S. Attorney.]

DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY'S OFFICE,
DISTRICT OF MASSACHUSETTS,
Boston, Sept. 16, 1898.

F. S. K. SMITH, Esq.,
Attorney at Law,
500 Fifth street N W., Washington, D. C.

DEAR SIR: In the second trial of the Bram case the jury were instructed that they had the power to return a qualified verdict. The instructions were as bare as I have stated. They were not instructed that the exercise of that power depended upon mitigating circumstances. The charge has not been printed.

Yours, very truly,

BOYD B. JONES,
United States Attorney.

(Dictated by B. B. J.)

Again, in the case of the United States vs. Dave Putty, in the United States court for the eastern district of Texas, the court, in its charge to the jury, in speaking of this act of Congress, says:
17 "In the Federal courts there are no degrees in murder unlike our State courts, and consequently a killing upon either express or implied malice is murder, and is punishable by death upon conviction, unless the jury in their discretion recommend 'without capital punishment,' which they have a right to do in each case where the party is charged with murder."

And in concluding its charge the court sums up thus:

"If you find the defendant guilty of murder the form of your verdict will be, 'We, the jury, find the defendant, Dave Putty, guilty of murder in the Indian Territory, as charged in this indictment.' If you see proper, in your discretion, you have a right to add, 'without capital punishment.' If you find him guilty of manslaughter the form of your verdict will be, 'We, the jury, find the defendant, Dave Putty, guilty of manslaughter.' If you find him not guilty the form of your verdict will be, 'We, the jury, find the defendant, Dave Putty, not guilty of murder as charged in this indictment;' date it and sign it by your foreman and return a verdict in court in accordance with your finding."

Wherefore the premises, your petitioner, submits that the question is one of such grave importance as to justify your honors' interference and review, to say nothing of the substantial right given by Congress of which your petitioner maintains he has been deprived. For which reason he further submits the judgment complained of ought to be reversed and a new trial ordered, to effect which he prays this honorable court that a writ of certiorari may issue to the court of appeals of the District of Columbia to remove the whole record and cause into this court for its

review and determination and for such other and further relief as to this court may seem just.

EDWARD SMITH,
By his attorneys,
F. S. KEY SMITH,
CHAPIN BROWN.

F. S. KEY SMITH,
CHAPIN BROWN,
Attorneys for Petitioner.

18 DISTRICT OF COLUMBIA, *ss:*

F. S. Key Smith, being duly sworn, deposes and says that he is one of the attorneys of the petitioner and is authorized to make this verification; that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge and belief, and that the source of his knowledge and the grounds of his belief are found in the proceedings and in the record of this cause in the court of appeals of the District of Columbia.

F. S. KEY SMITH.

Sworn and subscribed to before me this 10th day of October, A. D. 1898.

[SEAL.] CHARLES W. STETSON,
Notary Public, D. C.

We hereby certify that we have examined the foregoing petition and in our opinion it is well founded, and that the prayer of the petitioner should be granted.

F. S. KEY SMITH,
CHAPIN BROWN,
Attorneys for Petitioner.

19 In the Supreme Court of the United States.

EDWARD SMITH, PETITIONER AND PLAINTIFF IN ERROR,)
vs.
THE UNITED STATES, DEFENDANT IN ERROR.)

To the honorable the Attorney-General of the United States.

SIR: Please take notice that on the 11th day of October, A. D. 1898, at the opening of the court, or as soon thereafter as counsel can be heard, the petition of which the foregoing is a copy will be submitted to the Supreme Court of the United States for the decision of said court thereon.

F. S. KEY SMITH,
CHAPIN BROWN,
Attorneys for Petitioner.

The foregoing notice is hereby accepted, and service of a copy of said petition for writ of certiorari is hereby acknowledged this 10th day of October, 1898.

HENRY E. DAVIS,
U. S. Attorney, D. C.,
for the Attorney-General of the United States.

Brief of Kearney for Petitioner

Filed Nov. 23, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 431.

CHARLES WINSTON, PETITIONER,

vs.

THE UNITED STATES.

BRIEF FOR PETITIONER.

GEO. KEARNEY,
Attorney for Petitioner.

CHAS. H. TURNER, *Of Counsel.*

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 11-22-'98

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 431.

CHARLES WINSTON, PETITIONER,

vs.

THE UNITED STATES.

BRIEF FOR PETITIONER.

STATEMENT OF CASE.

This petitioner was tried in the supreme court of the District of Columbia, holding a criminal term, on March 8, 1898, under indictment 21574, for murder. He was found guilty as indicted, and on March 18, 1898, was sentenced to be executed the 25th day of May, 1898. He has been respited until January 12, 1899. Appeal was taken from said judgment to the Court of Appeals of the District of Columbia, and on June 7, 1898, said judgment was therein

affirmed, Mr. Justice Shepard dissenting. The case comes into this court by virtue of a writ of certiorari issued out of this honorable court and directed to the Court of Appeals of the District of Columbia.

ASSIGNMENT OF ERRORS.

The court erred in its interpretation of the act of January 15, 1897, entitled "An act to reduce the cases in which the penalty of death may be inflicted," (Record, pages 7 and 8).

a. In limiting the application of the act of January 15, 1897, to cases in which there are mitigating circumstances.

b. In instructing the jury under what circumstances it should or should not add the words " without capital punishment," whereas the jury should have been informed of the law and left to the free exercise of its own discretion.

c. In instructing the jury that there were no mitigating circumstances in this case (Record, page 7, line 15).

d. The trial justice invaded the province of the jury, because his charge taken in its entirety was a virtual instruction to them not to add " without capital punishment " to their verdict.

ARGUMENT.

[Assignments of Error A and B.]

The error complained of by petitioner is in the construction the court placed upon the act of Congress of January 15, 1897, entitled "An act to reduce the cases in which the death penalty may be inflicted." This act provides in the most explicit terms "that in all cases where the accused is found guilty of murder * * * the jury may qualify their verdict by adding thereto 'without capital punishment.'" There is here no ambiguity of language and no excuse to go beyond the plain words of the statute to gather the meaning of the legislators. There being no ambiguity, the accused was entitled to the full strength of the letter of the law. On this point we beg to quote from Sutherland on Stat. Const., section 247: "If the words of the statute are precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do in such cases best declare the intention of the legislature." And, again, we find in Potter's Dwarris on Statutes the following, page 245, note 35: "A further rule is that an offender who is protected by its letter cannot be deprived of its benefit on the ground that his case is not within its spirit," citing United States *vs.* Ragsdale, 1 Hemp., 497. The words of the statute of January 15, 1897, are "precise and unambiguous;" it applies to all cases of murder. It is not competent for the trial court to limit its application to a certain class of cases, to wit, cases with mitigating circumstances. This action of the court was plainly contrary to the spirit of our criminal jurisprudence and in violation of the well-settled rule of construction of penal statutes. Especial attention is invited to Endlich, Interpretation of Statutes, sections 4 and 7.

"The legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction" (section 4). And, again, "When the words admit of but one meaning a court is not at liberty to speculate on the intention of the legislature or to construe an act according to its own notions of what ought to have been enacted. * * * The question for him is not what the legislature meant, but what the language means" (section 7).

In any event the accused was entitled to the most favorable construction of the words of the statute. (See Sutherland, Stat. Const., sections 347, 349; Endlich, Interpretation Stat., section 329; Bishop, Statutory Crimes, sections 196 and 227.)

Hence it is manifest that the trial court erred in attempting to write into the law—*i. e.*, the act of January 15, 1897—a limitation which the plain words of the act in their ordinary meaning did not contain.

2. Assuming, however, that there was any occasion for the court to go beyond the letter of the statute of January 15, 1897, to ascertain its meaning, we most respectfully submit that the court misconceived the scope and spirit of the said act.

This act was passed by the Fifty-fourth Congress, and to elucidate the meaning placed upon it by that body we quote the following:

Mr. CURTIS: "In the Fifty-third Congress a bill was introduced defining murder in the first and second degrees. The Committee on the Judiciary unanimously reported it, and it passed the House of Representatives. While pending in the Senate the Attorney General of the United States, Mr. Olney, was of the opinion that murder should not be defined as of the first and second degrees, and members of the Committee on the Judiciary of the Senate were also of the opinion that as the practice of the Federal courts is that of the

common law, it was not advisable to introduce the question of definition into the statutes, and that it was preferable to repeal such sections prescribing capital punishment for offenses which the committee thought it desirable to have abolished." * * * "In respect to the crimes of murder and rape it preserves the death penalty, but it permits, as is provided in the State of Louisiana in express terms, and in many other States in principle, that the jury may in bringing in their verdict decide whether capital punishment shall be inflicted or not by allowing the jury to add the words 'without capital punishment' to their verdict. If that clause is added, the court will sentence the accused to imprisonment for life, and if there is no recommendation, then the death penalty will be inflicted, as now provided for those crimes."

Mr. SAYERS: "I should like to know from the gentleman (Mr. Curtis) whether, where robbery is attempted and death follows, this bill modifies the punishment inflicted?"

Mr. CURTIS: "The bill allows the reduction of the penalty *in every case.* The jury decide in *each case.*" * * *

"I am sorry, I frankly say, that this is not a bill totally abolishing capital punishment" (Congressional Record, 54th Congress, 1st session, vol. 28, pt. 3, pages 2649, 2650).

3. It thus appears that this statute was adopted as a law of the United States from the State of Louisiana. (See Congressional Record, *supra.*) Attention is invited to the resemblance of the statutes.

Louisiana statute:

"In all cases where the punishment denounced by law is death it shall be lawful for the jury to qualify their verdict by adding thereto 'without capital punishment.' And whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to hard labor for life, in the State penitentiary."

Wolff's La. Rev. Laws, 1897, sec. 1000 (Sess. Acts 1846, page 118).

United States statute:

"That in all cases where the accused is found guilty of the crime of murder or of rape * * * the jury may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life."

29 U. S. Stat. at L., 487.

This provision of the Louisiana law, as incorporated in the act of Congress, is essentially in the same words and of precisely the same meaning. There can be no doubt that it is an adoption of the Louisiana statute.

This being so, the known and settled construction which this statute had in Louisiana prior to its enactment by Congress must be considered as having been adopted by Congress with the text thus expounded.

Willis *vs.* Eastern Trust and Banking Co., 169 U. S., 295, 307.

Allen *vs.* St. Louis Bank, 120 U. S., 20, 34.

Cathcart *vs.* Robinson, 5 Peters, 263.

The practice in Louisiana seems to be to leave absolutely to the jury the discretion of affixing or withholding the qualifying words in their verdict.

In State *vs.* Melvin (11 La. Annual, 535, 537) the following charge was given: "That juries had no right to qualify their verdict unless there were mitigating circumstances." The court, reversing this case, said:

"The qualification of the verdict [in capital cases] should be left where the law has left it—to the sound *discretion of the jury* upon the facts of the case, guided by a sense of their solemn responsibility, which is to do their whole duty to the State as well as to the accused."

4. Statutes substantially similar to the act of January 15, 1897, have been enacted in several of the States, and in

these States the practice seems to be to leave wholly to the discretion of the jury the fixing of the punishment. The trial justices of the several States appear to content themselves with a mere naked exposition of the law.

See Spain *vs.* State, 59 Mississippi, 19, 24 (1881):

"The judgment must be reversed, because of the second instruction given at the instance of the State. It limits and qualifies the right of the jury to fix the punishment at imprisonment for life, whereas the law confers on the jury this right without qualification or restriction. The *right of the jury to fix the punishment, as indicated, is without any condition. The most atrocious crime committed under the most aggravating circumstances may be punished by imprisonment for life instead of by death, if the jury so determine by its verdict.* The law demands a jury willing to be the instrument of visiting the penalty of death, and confers on such a jury the unconditional right to fix the punishment at imprisonment for life. It was erroneous to instruct the jury that its right was dependent on any state of the evidence or on any view it might take of it."

See also Walton *vs.* State, 57 Miss., 533.

Hill *vs.* State, 72 Ga., 131:

"The code leaves it in the discretion of the jury as to whether they will recommend imprisonment for life in the penitentiary of a person convicted of murder; *they are not limited or circumscribed in any respect whatever;* nor does the law prescribe any rule by which the jury may or ought to exercise this discretion. Therefore a charge that the jury, in considering the question of recommendation of mercy, should not be governed by their sympathies, but by their judgments, approved by the evidence in the case and the law applicable to it, was error."

Marshall *vs.* State, 74 Ga., 26, 31:

"They were instructed that if they found the defendant guilty of murder, they had the right to recommend that he be punished by confinement in the penitentiary for life, and if they made that recommendation, that had to be the penalty. In other words, they fixed the penalty, or they

had the right to refuse the recommendation, as they saw proper. If they failed to recommend, the prisoner might be hung, or if they recommended that he be imprisoned in the penitentiary for life, then that was the penalty fixed by law; that was a matter entirely with them, *upon which the court gave them no instruction, as he had no right to do so;* that it was a matter of which they had absolute control."

Inman *vs.* State, 72 Ga., 269, 280:

"In regard to the right of the jury to recommend imprisonment for life, the better practice is for the court to call the attention of the jury to the law and merely state to them that if they think proper they may, in addition to the verdict of guilty, recommend that defendant be imprisoned in the penitentiary for life."

See Doran *vs.* State, 7 Texas Ct. App., 385.
Myers *vs.* State, 8 Texas Ct. App., 321.

See also—

Cyrus *vs.* State, 29 Southeastern Reptr., 917, decided Nov. 15, 1897.

In California, it seems, a contrary view was taken for a time, but the older cases were overruled in People *vs.* Leary, 105 Cal., 486, and People *vs.* Kamaunu, 110 Cal., 609.

Indeed, the earlier case of People *vs.* Bawden (90 Cal., 195, 198) sharply criticises the action of a trial judge in instructing the jury upon this point:

"The legislature having confided to the *discretion of the jury* the fixing of the penalty of death or confinement in the State prison for life upon a verdict of guilty of murder in the first degree, the discretion of the jury in that matter is absolute."

People *vs.* Leary, 105 Cal., 486, 495.

"Discretion is given to the jury in regard to the punishment in case they find a defendant guilty of murder in the first degree, and the *court cannot direct or advise them upon the subject further than to inform them of their province.*"

People *vs.* Kamaunu, 110 Cal., 609, 613.

The only text-writer we find who has touched this subject at all is McClain, who, in section 363 of his recent work on Criminal Laws, says:

"By some statutes a discretion is left to the jury in determining the punishment, * * * and the court should not in any way interfere by instruction with the discretion of the jury."

5. Several murder cases have been tried in United States courts under the act of January 15, 1897, and while these cases are not reported, we append certified extracts from the charges of the trial justices taken from the stenographic notes.

In the case of The U. S. *vs.* J. W. Lewis the court charged as follows relative to a qualified verdict:

"A killing upon either express or implied malice in this court is murder, and upon conviction is punishable by death unless the jury in their discretion see proper to add to their verdict 'without capital punishment.' In that state of the case it is penitentiary for life.

"If you find the defendant guilty of murder, the form of your verdict will be: 'We, the jury, find the defendant, J. W. Lewis, guilty of murder in the Indian Territory, as charged in this indictment,' and if you see proper to add 'without capital punishment,' you simply add the words 'without capital punishment,' date it, and sign it by your foreman."

In the case of George De Laughter *et al.* the court charged as follows:

"Which the law does not reduce to manslaughter, and does not excuse upon the ground of self-defense. It is murder and is punishable by death unless the jury in their discretion see proper to add to their verdict 'without capital punishment.' In that event, you will find the defendant guilty as charged in the indictment, and if you see proper so to do, add to your verdict 'without capital punishment.'"

"Before the undersigned authority this day appeared Emma Keeler, who, being duly sworn, deposes and says that she is and was at the date of the trials of the cases of The U. S. *vs.* J. W. Lewis and The U. S. *vs.* George De Laughter *et al.*, charging the defendants with murder in the Indian Territory, the official stenographer of the U. S. courts at Paris, Texas; that the above and foregoing are true and correct copies of the charges delivered by the court relating to a qualification of the verdicts to be found by the juries, and are the only references in said charges regarding said qualifications.

"EMMA KEELER,
"*Official Stenographer U. S. Courts, Paris, Texas.*

"Subscribed and sworn to before me this 17th day of October, 1898.

[SEAL.] "C. DART,
"*Clerk U. S. Circuit Court, E. Dist. Texas,*
"By H. H. KIRKPATRICK, *Deputy.*"

"Clerk's Office U. S. Circuit Court, District of Massachusetts;
Alex. H. Trowbridge, clerk.

"BOSTON, *Sept.* 29, 1898.

"GEORGE KEARNEY, Esq.

"DEAR SIR: I have yours of yesterday, and in reply inform you that the judge, in charging the jury in the Bram case, used the following words relative to the giving of a qualified verdict:

"'Gentlemen, under the law of the United States, as it now stands, your verdict may be either 'guilty,' 'not guilty,' or 'guilty, without capital punishment.'" This is all that the court said about it. It is copied from the typewritten report made for court and counsel, taken from the stenographer's notes.

"Yours truly, ALEX. H. TROWBRIDGE, *Clerk.*"

6. In view of the foregoing, it would appear that if there existed any reason to attempt to *construe* a law so plain in its letter as the act of January 15, 1897 (which we deny), that the trial justice misconceived the spirit of that act. It

plainly was not the intention of Congress to divide the crime of murder into two degrees. Therefore to limit the application of this act to cases that have mitigating circumstances was beyond the power of the trial judge and was manifest error.

[Assignments of Error C and D.]

The trial justice also charged the jury in this case:

"There is no evidence that has been adduced which tends to show any palliating or mitigating circumstances."
Record, page 7, line 15.

This, we submit, is "plain error," and we invoke the rule in favor of the petitioner's life.

The judge's charge made the kind of punishment dependent upon the existence or non-existence of mitigating circumstances; it was therefore error striking at the very root of the case to have charged the jury that there were no mitigating circumstances. The charge was based on the theory that the law under consideration divided murder into "cases with mitigating circumstances" and "cases without mitigating circumstances," the punishment for cases "with mitigating circumstances" being life imprisonment and the punishment for cases "without mitigating circumstances" being the death penalty.

If this theory be correct, then the judge's charge that there were no mitigating circumstances in this case eliminated from the consideration of the jury that class of cases the punishment for which is life imprisonment, and made it obligatory upon them to impose the death penalty.

Similar to this is the case of Hopt *vs.* Utah, 110 U. S., 574, 582, where under a statute it is for the jury to say whether the facts make a case of murder in the first or second degree the trial judge told the jury: "That an atrocious and das-

tardly murder has been committed by some person is apparent." This court said that this instruction was naturally regarded by them as an instruction that the offense, by whomsoever committed, was murder in the first degree.

"There is a concurrence of opinion that instructions imperatively requiring the jury to return a verdict of guilty of either degree of murder, or which, by the *expression* or *intimation* of the opinion of the judge, infringe upon their exclusive province to ascertain and declare the degree, are essentially erroneous."

Brown *vs.* State, 109 Ala., 70, 77.

7. The jury in this case were plainly told that they should only qualify their verdict under "palliating circumstances which would seem to justify and require it," and they had been told with equal directness that "no evidence has been adduced which tends to show any palliating or mitigating circumstances."

This, it is submitted, is a direction to the jury not to add the qualifying words to their verdict in this case.

It is a virtual denial of this statute to this accused, and leaves him in no better plight than a refusal to acquaint the jury with the provisions of the statute of January 15, 1897, would have done, which would have been palpable error.

See Calton *vs.* Utah, 130 U. S., 83.

The syllabus of which case is as follows:

"In a conviction for murder in the first degree in Utah: Held, that the court erred in not directing the attention of the jury to the provision of the penal code as to their right to recommend imprisonment for life, at hard labor, in the penitentiary in place of the punishment by death.

"By such action the court deprived the prisoner of a substantial right."

And, finally, it is respectfully submitted that the charge of the trial judge, taken in its entirety, was a direction to

the jury not to add the qualifying words to their verdict in this case. It is nowhere denied that, in any view of the law, to the jury must be left at last the right to make up their verdict on this, as well as every other part of the case; and this, we apprehend, is equally true, even if it be considered proper for the trial justice to advise and instruct them upon this point. The jury must finally be left untrammeled to add or withhold the qualifying words as they see fit. Such necessary freedom of action, we contend, was denied the jury in this case. We quote from the dissenting opinion of Mr. Justice Shepard in this case: "With such instructions as were given in this case, no jury composed of good citizens, accustomed, as it is their duty, to accept and apply the law as given them in charge by the court, could have extended clemency to any one of these appellants. * * * It did not give the accused the benefit of the statute."

GEO. KEARNEY,
Attorney for Petitioner.

CHAS. H. TURNER, *Of Counsel.*

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 432.

WILLIAM M. STRATHER, PETITIONER,

vs.

THE UNITED STATES.

BRIEF OF THE PETITIONER.

STATEMENT OF THE CASE.

The petitioner, William M. Strather, was tried in the supreme court of the District of Columbia, holding a criminal term, on the 7th, 8th, 9th, and 10th days of February, 1898, under indictment numbered 21474, for murder, and the jury returned a verdict of guilty as indicted, and the petitioner was sentenced on the 4th day of March to be executed on Thursday, the 5th day of May, 1898. The petitioner prayed an appeal to the Court of Appeals of the District of Columbia from that portion of the instruction of the trial court to the jury that related to the act of January 15, 1897. The

Court of Appeals on the 7th day of June, 1898, affirmed, by a divided court, the judgment and sentence of the lower court. The petitioner, on the 11th day of October, 1898, filed a petition in this court for a writ of certiorari to the Court of Appeals, and on the 31st day of October, 1898, this court granted the said writ as prayed. The petitioner comes before the court today for the purpose of having this honorable court review and determine whether or not the Court of Appeals erred in affirming a judgment of the lower court based on a verdict upon instructions which petitioner claims were prejudicial to him and not permissible under right construction of the act of January 15, 1897, and that if injustice has been done him the said judgment of the Court of Appeals may be reversed.

ASSIGNMENTS OF ERROR.

The Court of Appeals of the District of Columbia erred in affirming the judgment and sentence of the trial court in that part of its charge to the jury which related to the construction of the statute of January 15, 1897, as follows (page 11 of the Record):

"I have no doubt that this act of Congress was intended to serve some useful purpose. The penalty for murder has not been disturbed by this act of Congress; it is fixed by law; the jury neither make nor unmake it. Doubtless the intention of the legislature was this: that in a case in which the jury reach the conclusion that the party on trial is guilty of murder circumstances are shown by the evidence that are of a palliating nature they may give the defendant the benefit of those palliating circumstances and say in their verdict 'without capital punishment.' If, however, the jury believe that there are no palliating circumstances it is their duty not to add anything, but to leave the penalty as it stands. It may be that a provision of this kind in the law was intended to apply to a case somewhat like that suggested by the District attorney. Suppose a man knowing

that his wife had been in improper relations with another man and roused to anger by such knowledge, but postponing from time to time, while he meets this man, the execution of his vengeance upon him, he finally concludes to and does kill him, that would be murder—a clear case of murder under the law; but those circumstances might be such as would convince the jury that the extreme penalty of the law ought not to be inflicted. There may be other cases; I simply give this as an illustration. But the object of this penalty, gentlemen of the jury, is to protect society, and the jury should not interfere with it under any circumstances, unless the circumstances are such as to satisfy them that this provision should be added to the verdict."

ARGUMENT.

The act of January 15, 1897, is as follows:

"An act to reduce cases in which the penalty of death may be inflicted, vol. 29, Statutes at Large, page 487.

"That in all cases where the accused is found guilty of the crime of murder or of rape under section fifty-three hundred and thirty-nine or fifty-three hundred and forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto 'without capital punishment,' and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment at hard labor for life."

The trial court, in charging the jury, said (Record, page 11):

"The penalty for murder has not been disturbed by this act of Congress; it is fixed by law; the jury neither make nor unmake it."

Before the law of January 15, 1897, was passed the punishment for murder was death penalty, but the new law makes a specific change by providing "that in all cases the jury may qualify their verdict," which qualified verdict calls for life imprisonment.

It is the duty of the courts to confine themselves to certain rules in the construction of statutes.

Potter's Dwarris on Statute and Constitution, at page 200, says:

"It is the duty of the courts to confine themselves to the words of the legislature, nothing adding thereto, nothing diminishing. We must not import into an act a condition or qualification which we do not find."

"If the words of the statute admit of but one meaning, a court is not at liberty to speculate on the intentions of the legislature or to construe an act according to its own notions of what ought to have been enacted."

Endlich Interpretation of Statutes, secs. 4 and 7.

The lower court in its charge to the jury *speculated*, in part, as follows (Record, page 11):

"Doubtless the intention of the legislature was this: that in a case in which the jury reach the conclusion that the party on trial is guilty of murder circumstances are shown by the evidence that are of a palliating nature they may give the defendant the benefit of those palliating circumstances and say in their verdict 'without capital punishment.' If, however, the jury believe that there are no palliating circumstances *it is their duty not to add anything, but to leave the penalty as it stands.* It may be," continued the judge, "that a provision of this kind in the law was *intended* to apply to a case somewhat like that suggested by the District attorney. Suppose that a man knowing that his wife had been in improper relations with another man and roused to anger by such knowledge, but postponing from time to time, while he meets this man, the execution of his vengeance upon him, he finally concludes to and does kill him, that would be murder—a clear case of murder under the law; but those circumstances might be such as would convince the jury that the extreme penalty of the law ought not to be inflicted. There may be other cases. I simply give that as an illustration."

"It is, therefore, only in the construction of statutes whose terms give rise to some ambiguity or whose grammatical construction is doubtful, that courts can exercise the power of controlling the language in order to give effect to what

they suppose to have been the real intention of the law-makers."

George *vs.* B'd of Educ'n, 33 Ga., 344.
Newell *vs.* People, 7 N. Y., 97.

Justice Shepard, of the Court of Appeals, in his dissenting opinion, on page 12 of the record, says:

"With such instructions as were given in this case, no jury composed of good citizens accustomed, as it is their duty, to accept and apply the law as given them in charge by the court could have extended clemency to any of these appellants."

The court says in Steer *vs.* Brownwell, 124 Ill., 27:

"But a court cannot insert words into a statute which were not used by the legislature, for its province is to ascertain the meaning of a statute from the words used without adding thereto or taking therefrom."

Potter's Dwarris on Statute and Constitution, at page 143, says:

"It is not permitted to interpret what has no need of interpretation. When an act is expressed in clear and precise terms; when the sense is manifest and leads to nothing absurd, there can be no reason not to adopt the sense which it naturally presents. To go elsewhere in search of conjectures in order to restrain or extinguish it is to elude it."

"In construing statutes the accused is entitled to the most favorable construction of the words of the statute" (Sutherland, Stat. Const., sec. 349; Endlich, Interpretation Statutes, sec. 329; Bishop, Statutory Crimes, secs. 196 and 227).

The framers of the act of January 15, 1897, meant what the statute says—no more and no less—as the following discussion will show when the bill was under debate in the House of Representatives, 54th Congress, 1st session, vol. 28, pt. 3, pages 2649, 2650:

Mr. SAYERS: "I should like to know from the gentleman, Mr. Curtis, whether, where robbery is attempted and death follows, this bill modifies the punishment inflicted?"

Mr. CURTIS: "The bill allows the reduction of the penalty in *every case*. The jury decides in each case. I am sorry, I frankly say, that this is not a bill totally abolishing capital punishment."

There is no question from the above but that Congress intended that the jury should decide in each case uncontrolled by the advice of the court, and, if they saw fit, to reduce the penalty in every case, irrespective of palliating or other circumstances.

It is a familiar canon of construction that "a thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter; and a thing within the letter of the statute is not within the statute unless it be within the intention of the makers."

"The intention of the legislature should always be considered in giving construction to a statute" (Orndoff *vs.* Turman, 2 Leigh, 200).

"In construing statutes, courts, in order to ascertain the intention of the legislature, will judicially notice such contemporaneous history as led to and probably induced the passage of the laws" (5 Conn. Mut. Ins. Co. *vs.* Talbot, 113 Ind., 373).

"Courts have no dispensing power over statutes; where they contain no exceptions the courts can make none. If they are too rigid in their terms, the remedy is with the legislature" (Box *vs.* Stanford, 13 Smedes & M., 93; 51 Am. Dec., 142).

In the State of Georgia the statute leaves it in the discretion of the jury as to whether they will recommend imprisonment for life in the penitentiary of a person convicted of murder.

In Hill *vs.* State, 72 Ga., 132, the lower court in substance said:

"You must be governed by your judgment, approved by the evidence in the case and the law applicable to it, and then say, What is your duty as twelve upright sworn jurors."

The supreme court said:

"This law does not prescribe any rule by which the jury may or ought to exercise this great discretion. It does not say that the jury are not to be governed by their judgment as instructed by the court below. The court below imposed by its charge restrictions upon the jury unauthorized and unwarranted by the statute."

The supreme court said, in Inman *vs.* State, 72 Ga., 280:

"In cases like this we think the better practice would be for the court to call the attention of the jury to the law and merely state to them, if they thought proper they might, in addition to the verdict of guilty, recommend that the defendant be imprisoned in the penitentiary for life."

In the case of Johnson *vs.* State, 58 Ga., 491, the supreme court said:

"Morever, the charge in that case confined the right of the jury in this, that the court charged that if there were no circumstances to justify you in recommending him to the mercy of the court, 'Why, then, you ought not to do it.' Such a charge as that would be error under the statute in respect to punishment for murder, because it said to the jury that they ought not to recommend to mercy unless such and such was proved."

Chapter 58, section 2, of the Laws of Mississippi, reads as follows:

"That in all cases where any person or persons, upon conviction of crime, shall or may be punished with death, the jury may, in their discretion, in their verdict declare that the penalty or punishment shall be imprisonment in the penitentiary for life; but if the jury shall omit to so declare the penalty in their verdict, then the court shall pronounce the death penalty."

Spain *vs.* State, 59 Miss., 19, 24, the court said:

"The most atrocious crime committed under the most aggravating circumstances may be punished by imprisonment for life instead of by death, if the jury so determines by its verdict. The law demands a jury willing to be the instrument of visiting the penalty of death and confers on such a jury the unconditional right to fix the punishment at imprisonment for life. It was erroneous to instruct the jury that its right was dependent on any state of the evidence or on any view it might take of it."

See also Walton *vs.* State, 57 Miss., 533.

McClain in his work on Criminal Law, section 363, says:

"By some statutes a discretion is left to the jury in determining the punishment, and the court should not in any way interfere by instruction with the discretion of the jury."

In State *vs.* Melvin, 11 La. Annual, 535, 537, the court said:

"The qualification of a verdict should be left where the law has left it, to the sound discretion of the jury upon the facts of the case, guided by a sense of their solemn responsibility, which is to do their whole duty to the State as well as to the accused."

The practice in Louisiana is to leave absolutely to the jury the discretion of affixing or withholding the qualifying words in their verdict, and the statute of January 15, 1897, was taken from that State. (See statute of Louisiana, act of May 29, 1856.) Therefore in construing the statute of January 15, 1897, it ought to be given the same construction that it receives in that State.

"The statute from State or country where they become the subject of adjudication in another, are to receive the same construction that is given to them in the courts of the former."

Elmendorf *vs.* Terry, 10 Wheat, 153.

Smith *vs.* Coudry, 1 How., 28.

"The construction of a statute of a court of the State where it is enacted should be followed in the courts of other States."
Cave *vs.* Cushman, 3 Watts, Sec. 544; 39 Amer. Dec., 47.

Since the act of January 15, 1897, several murder cases have been tried in different United States courts, and they charged the juries with relation to the statute in the following manner:

In the eastern district of Texas, at the April term, in 1898, in the case of George De Laughter, Mr. Justice Bryant said:

"In the event you find the defendant guilty as charged in the indictment, and if you see proper so to do, add to your verdict 'without capital punishment.'"

In the case of J. W. Lewis, tried at the same term of the Texas court, the judge charged the jury as follows:

"A killing, upon either express or implied malice, in this court is murder, and, upon conviction, punishable by death, unless the jury in their discretion see proper to add to their verdict, 'without capital punishment.' In that State of the case it is penitentiary for life."

United States *vs.* Bram, tried in the United States court at Boston, the court said:

"Gentlemen, under the law of the United States, as it now stands, your verdict may be either guilty, not guilty, or guilty, without capital punishment."

In the majority opinion of the court of appeals the court said, on page 15 of the record of this case:

"But Congress has not abolished capital punishment for murder, but has made the degree of punishment to depend upon the special circumstances of each case as they may be found by the jury. In many of the States, as we know, if not in a majority of them, it has long since been deemed proper and just to divide the common-law crime of murder into first and second degrees, and prescribe the punishment accordingly."

In the Congressional Record, Fifty-fourth Congress, first session, vol. 28, part 3, pages 2649–2650, it will be seen where Mr. Curtis, on the floor of the House, spoke as follows:

"Mr. CURTIS: In the Fifty-third Congress a bill was introduced defining murder in the first and second degrees. The Committee on the Judiciary unanimously reported it, and it passed the House of Representatives. While pending in the Senate the Attorney General of the United States, Mr. Olney, was of the opinion that murder should not be defined as of the first and second degrees, and members of the Committee on the Judiciary of the Senate were also of the opinion that as the practice of the Federal courts is that of the common law it was not advisable to introduce the question of definition into the statute, and that it was preferable to repeal such sections prescribing capital punishment for offenses which the committee thought it desirable to have abolished."

Continuing, the court said, on page 16 of the Record:

"This finding, however, should be made with reference to the facts of the case, as it is manifest that it was never intended that a party shown to have committed the crime under the most revolting and atrocious circumstances should receive the qualified or mitigated punishment, and a party under much less revolting and atrocious circumstances should or might receive punishment by death, according to the temper and notions of different juries trying the parties."

Again the court said, on page 16 of the record:

"In construing a statute it is not only the letter but the spirit, the reason, and legislative intent that must be regarded, and that, in all cases, presents a question for the court. And in the statute under consideration there is nothing to indicate an intention on the part of Congress to divest the court of its legitimate function in cases where the provision of the statute is applicable."

The courts are only called upon to construe statutes when they are ambiguous and uncertain in their meaning. The statute under consideration, we contend, needed no con-

struction by the lower court, and when the trial judge said: "Doubtless the intention of the legislature was this: that in a case in which the jury reach the conclusion that the party on trial is guilty of murder, circumstances are shown by the evidence that are of a palliating nature, they may give the defendant the benefit of those palliating circumstances and say in their verdict 'without capital punishment,'" he made the statute ambiguous and uncertain in its meaning and intent.

Justice Shepard, of the Court of Appeals, in his dissenting opinion, said, on page 20 of the record:

"I cannot accept as sound the argument that the purpose of Congress in this enactment was substantially the same as shown in the legislation of the States, whereby the offense of murder has been divided into two degrees—murder of the first degree and murder of the second degree. In the enforcement of those statutes the courts are required to declare the law to the jury in application to the facts. Where the evidence shows plainly that the accused, if guilty at all, is guilty of murder of the first degree and nothing less, it is the duty of the court to withhold from the jury the privilege of returning a verdict of guilty of murder of the second degree. The court is not required to submit the question of the degree of guilt to the jury regardless of the evidence, as under the act of Congress it is compelled to extend to them the privilege of commuting the death penalty. If the purposes of the two sets of statutes are the same, it would be more reasonable to hold that under the act of Congress the right to commute the death penalty should not be accorded to the jury at all unless the evidence should discover something tending to warrant the exercise of clemency."

If this court shall be of the opinion that the contentions of petitioner are well founded, it is very respectfully submitted that the judgment of the Court of Appeals should be reversed.

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No. 433.

Brief of Smith for Appellant

NOV 23 1898
JAMES H. McKENNEY,
Clerk.

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Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 433.

EDWARD SMITH, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES, DEFENDANT IN ERROR.

BRIEF FOR APPELLANT.

F. S. KEY SMITH,
Counsel for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 11-22-'98

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EDWARD SMITH, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES, DEFENDANT IN ERROR.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

The plaintiff in error was, by the grand jurors of the United States in and for the District of Columbia, by indictment No. 21518 of the supreme court of said District, indicted for murder, and upon arraignment and plea of "not guilty," on February 17, 1898, after trial, convicted.

Upon an exception taken at the trial to a certain portion of the court's charge, the question of law thereby involved was carried by appeal to the Court of Appeals of the District of Columbia, which court, by a majority, affirmed the instruction of the lower court. The cause now comes on to be heard here in consequence of this honorable court granting a writ of certiorari to the said Court of Appeals.

ERROR ASSIGNED.

The error complained of in the instruction of the *nisi prius* court and as affirmed by the appellate court is shortly as follows:

By an act of Congress approved January 15, 1897, juries in the United States courts are empowered to qualify their verdicts in capital cases as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in all cases where the accused is found guilty of the crime of murder or of rape under sections fifty-three hundred and thirty-nine or fifty-three hundred and forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life" (29 Stats., 487).

There are four other sections to this act, but as they do not qualify or in any way diminish the effect of this, the first one, they are, for the sake of space and time, not quoted here.

The part of the instruction of the trial court which was affirmed by the Court of Appeals, constituting the error complained of, is as follows:

"Under a recent statute the jury are authorized, in returning a verdict of guilty of murder, if the evidence justifies them on their consciences in so doing, to qualify the verdict by the addition of the words 'without capital punishment.'

"The law inflicting the penalty of death for murder has not been repealed. That is the penalty which the law fixes. You are not responsible for that penalty; neither am I. The existence of that law is well known to the community. The man who violates the law by committing murder should anticipate the infliction of the death penalty. In so perpetrating murder, he must do it with his eyes open to the consequences. The legislature probably intended that in

cases where there were some mitigating or palliating circumstances, where it was apparent from the evidence that the crime was not the most heinous crime of murder, or where there was doubt whether the circumstances indicated premeditation, perhaps, that the jury might qualify their verdict by adding the words 'without capital punishment.' But it was evidently contemplated by Congress that there would be cases in which juries would not be justified in so qualifying their verdicts, and therefore the law remains, and unless the verdict is so qualified the penalty of the law is unchanged." (See Record, page 8.)

To this the defendant below excepted, and submits the Court of Appeals erred in affirming, for the language of the statute is plain, and it is maintained and respectfully submitted the act gave and does give, as it expressly says, the jury the right in "all cases" to qualify their verdict.

ARGUMENT.

The question simply stated is this: Did Congress intend to give juries the unlimited discretion to qualify their verdicts, or was it the intention of Congress that such discretion should be exercised only in cases where there were mitigating or palliating circumstances? If the former is the true premises the instruction of the trial court was error and should be reversed; if the latter be correct, then there is no error and the same should be affirmed. It therefore is our purpose to show the former to be the true standpoint from which to view the statute; in other words, that Congress intended what it has expressly said, or that juries were to have the unlimited discretion and power to qualify their verdicts. If we succeed in demonstrating this we shall ask that the judgments complained of be reversed.

Vattel lays down the first general maxim or rule of interpretation to be,

"It is not permitted to interpret what has no need of interpretation. When an act is conceived in clear and precise terms, when the sense is manifest and leads to nothing absurd, there can be no reason to refuse the sense which this treaty naturally presents. To go elsewhere in search of conjectures in order to restrain or extinguish it, is to endeavor to elude it" (Pot. Dwr. Stats., 126).

We find the same rule given in Mr. Justice Potter's edition of Dwarris, in these words:

"In the enactment of statutes the rule of interpretation is, in respect to the intention of the legislature, that where the language is explicit the courts are bound to seek for the intention in the words of the act itself, and they are not at liberty to suppose or to hold that the legislature intended anything different from what their language imports" (page 146).

We submit there is little need to go further. Can it be said the language of this statute is not explicit? Had Congress intended any restriction upon the comprehensive expressions used, is it not just and reasonable to suppose that they would have said so? Has the court, then, any right to read into an enactment, where the words are plain, something which is neither expressed therein nor reasonably to be implied?

Mr. Justice Story, in the first volume of his work on the Constitution, expresses the above rule in this language:

"It has been observed, **with great correctness,** that although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its letter. **It would be dangerous in the extreme to infer from extrinsic circumstances that a case, for which the words of an instrument expressly provide, shall be exempted from its operations"** (section 427).

Upon the maxim, *ita lex scripta est*, so much may be cited and said that it becomes difficult to know just where to draw the line. We assume, however, that one or two cases in point will not be amiss.

Mr. Justice Story, speaking of the Constitution, in delivering the opinion of this court in the case of Martin *vs.* Hunter's Lessee, 1 Wheaton, 347, says:

"We can only construe its powers and cannot inquire into the policy or principles which induced the grant of them."

And, in the case of United States *vs.* Fisher, 2 Cranch, S. C., 390, Mr. Chief Justice Marshall, delivering the opinion of this court, has said:

"If this language was ambiguous, all the means recommended by the counsel for the defendants would be resorted to in order to remove the ambiguity. But it appears to the majority of this court to be too explicit to require the application of these principles, which are useful in doubtful cases."

Again, in the same case, the court observes:

"It is also true that where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be **plain,** in which case it **must be obeyed**" (*id.*, 386).

That this rule is clearly settled is too well known to require further citing of authorities; therefore, asking to be indulged while we quote from one other decision of this court, we shall proceed. In the case of The United States *vs.* The Union Pacific Railway Co., 91 U. S., 91, the doctrine is affirmed in this language:

"The rights of the parties rest upon a statute of the United States. Its words, as well as its reason, spirit, and intention, leave, in our opinion, no room for doubt as to its true meaning. **We cannot sit in judgment upon its**

wisdom or policy. When we have interpreted its provisions, if Congress had power to enact it, our duty in connection with it is ended."

See also in this connection:

Ruggles *vs.* Illinois, 108 U. S., 543.
Hyatt *vs.* Taylor *et al.*, 42 N. Y., 260.
Dudley *vs.* Reynolds, 1 Kans., 274.
Douglass *vs.* Chosen Freeholders, 38 N. J. L., 216.
Camden, etc., R. R. Co. *vs.* Commissioners of Appeal, 18 N. J. L., 72.
Rudderow, collector, *vs.* State, 31 N. J. L., 518.

From these cases it therefore appears, if the language of the act in question be plain, it was error for the court to go outside of its provisions to ascertain the intention of the legislative power which enacted it.

That the phrase "all cases" includes every case, we refer and ask the court's attention to the cases of—

Martin *vs.* Hunter, 1 Wheat., 339.
Cohens *vs.* Virginia, 6 Wheat., 264.
Mayor *vs.* Cooper, 6 Wall., 251.
Tennessee *vs.* Davis, 100 U. S., 270.

In the first of these Mr. Justice Story makes use of the following argument:

"How otherwise could the jurisdiction extend to *all* cases arising under the Constitution, laws, and treaties of the United States, or to *all cases* of admiralty and maritime jurisdiction? If some of these cases might be entertained by State tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not extend to *all*, but to *some* cases."

Applying the same test to the case at bar, if, as is said by the trial justice in his charge to the jury, "that there would

be cases in which juries would not be justified in so qualifying their verdicts," would not this act, under such a construction, extend only to **some** and not to **all** cases?

We submit, then, that such an interpretation is, when properly viewed, not alone against the letter, but likewise is in conflict with the spirit of the enactment. It was certainly the purpose of Congress by this statute to remedy some evil or correct some fault in the then existing law or, in other words, in sections fifty-three hundred and thirty-nine and fifty-three hundred and forty-five of the Revised Statutes of the United States. As the last section affects the crime of rape it has no application here. What, then, is section fifty-three hundred and thirty-nine? It provides that: "Every person who commits murder within any fort, arsenal, dock yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States; * * * **shall suffer death.**" Can it be disputed that the act of January 15, 1897, has application alone to the penalty prescribed in the above section? This being so, that penalty therein prescribed, which is death, must be the evil which Congress has sought to remedy. How, then, has it sought this remedy? Why, by giving the jury the power in "all cases" to qualify their verdict, or, what is the same thing, to abolish the death penalty in any case they (the jury) may deem proper. But, it has been argued, juries may abuse this power. Whether there may be juries that would abuse the power is not our purpose here to determine, being content to reply to this argument with the words of Mr. Justice Story, as expressed in the case of Martin *vs.* Hunter, 1 Wheat., page 344: "It is," says the learned justice, "always a doubtful course to argue against the use or existence of a power from the possibility of its abuse. It is still more difficult, by such an argument, to ingraft upon a general power a restriction which is not to be found in the terms in which it is given." The writer,

however, finds it difficult to conjecture how an unlimited power can be abused.

It is laid down in Heydon's Case, 3 Reports, page 7, "that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered:

I. What was the common law before the making of the act?

II. What was the mischief and defect for which the common law did not provide?

III. What remedy the Parliament both resolved and appointed to cure the disease of the Commonwealth.

IV. The true reason and remedy; and then the office of all the judges is always to make such construction **as shall suppress subtile inventions and evasions for continuance of the mischief,** and, *pro privato commando*, to add force and life to the cure and remedy according to the true intent of the makers of the act, *pro bono publico.*

It is clear that section fifty-three hundred and thirty-nine, Revised Statutes of the United States, was the law before the passage of the act in question. Is it not equally as clear from what we have just said that the death penalty was the mischief or defect sought to be remedied for which the common (old) law did not provide (or rather in this instance did provide)? It is equally as clear that the act of January 15, 1897, is the remedy that Congress has resolved and appointed to cure the disease as it is that section fifty-three hundred and thirty-nine is the old law containing the disease. What, then, is the true reason and remedy? May it not be assumed with as much propriety and safety as any other assumption which is capable of being made in connection with this stat-

ute, that the act here in question being the direct outgrowth of several bills introduced in Congress to abolish in terms capital punishment, that Congress, not being satisfied to take the responsibility of so radical a departure, has pursued a middle course and allowed the jury to do so in each, every, and "all cases" where they may deem it proper? If this be true, must not the decision complained of be wrong and should not it be reversed?

That this assumption is well founded or, in other words, that it is more reasonable to infer from this statute an intent to allow the jury to abolish capital punishment than to merely qualify their verdicts in cases where there are mitigating or palliating circumstances, is evinced by an examination of the remaining four sections of the statute. By sections two and three, without quoting them at length, saving the exceptions therein enumerated, capital punishment is in terms abolished. Section four has reference to the retrospective effect of the act, and section five reduces the punishment for rape committed by any Indian within the Indian reservations to **imprisonment** at the discretion of the court. Is not the tenor of this act one to abolish capital punishment? This being true, is not the assumption, in the light of the rule "that the intention of the lawgiver is to be deduced from a view of the whole and of every part of the statute taken together" (Dwarris' Stats., 658), but a fair one?

Another rule of law for the better interpretation of statutes, as stated in Potter's edition of Dwarris, at page 42, note, and affirmed by this court many times, among the last being the case of Willis *vs.* Eastern Trust and Banking Co., 169 U. S., 295, is: "Where the English statutes are adopted into our own legislation, the known and settled construction of them by the courts of law is considered as silently incorporated into the act or is received with all the weight of authority."

In the State of Louisiana a very similar enactment to the

act of January 15, 1897, prevails. It enacts "that in all cases where the punishment denounced by law is death it shall be lawful for the jury to qualify their verdict by adding thereto 'without capital punishment,' and that whenever the jury shall return a verdict qualified as aforesaid the person convicted shall only be sentenced to hard labor for life in the State penitentiary."

The court's attention is directed to the striking similarity of the two enactments, the act of January 15, 1897, providing "that in all cases where the accused is found guilty of the crime of murder or of rape under section fifty-three hundred and thirty-nine or fifty-three hundred and forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto 'without capital punishment,' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life."

This court, by Mr. Justice Gray, in the case of Willis *vs.* The Eastern Trust and Banking Co., cited above, which was a case that came up from this District under a writ of certiorari, has said:

"The resemblance between the provisions of the Massachusetts statute of 1860 and the act of Congress of 1864 is so remarkable, that it is evident that the latter were taken from the former. This being so, the known and settled construction, which those statutes had received in Massachusetts before the original enactment of the act of Congress, **must be considered as having been adopted by Congress with the text thus expounded.**"

Is not this equally as true with the two statutes above set out? Are they not almost identical? Looking, then, at a few of the decisions of the supreme court of Louisiana under their statute prior to the passage of our act of Congress, we find, in the case of The State *vs.* Shield, 11 La. Ann., 395, that court, in passing upon the very point here at issue, on an error assigned to the following instruction:

"Murder is of very frequent occurrence in this community, and when a jury has a case of murder which is clearly made out, the court believes it necessary for a jury to bring in an unqualified verdict, in order to deter others from crime," holding:

"Such a charge was calculated to impress upon the minds of the jurors that in all cases of murder they were not at liberty, or, at least, could not with propriety exercise that discretion which is expressly conferred by the statute of 1846, which declares that in *all cases* where the punishment demanded by law is death it shall be lawful for the jury to qualify their verdict by adding thereto, 'without capital punishment.'

"We think the discretion of the jury should not have been trammeled by instructions which were not only calculated to secure an unqualified verdict, but might have been construed by the jury into an intimation of the opinion of the court as to the guilt or innocence of the prisoner."

In another case, State *vs.* Melvin, 11 La. Ann., 537, arising upon a similar exception the supreme court of Louisiana has expressed itself against the validity of such an instruction as follows:

"The qualification of the verdict should be left where the law has left it, to the sound discretion of the jury, upon the facts of the case, guided by a sense of their solemn responsibility, which is to do their whole duty to the State as well as to the accused.

"We are not insensible to the public evils, deprecated by the district judge, and which naturally provoked the strong expressions contained in his charge.

"But we are sitting as judges, to apply the laws as they are to a particular controversy, growing out of facts, not as legislators to originate and prescribe general rules for the future. If existing laws are found to work badly, the remedy is to be sought at the hands of the power which enacted them. Whilst they remain upon the statute books, they must be obeyed by the courts without reference to their expediency."

It is submitted, then, if these decisions of Louisiana, as has been said by this court, are to be considered as having been adopted by Congress as part of the act of January 15, 1897, the question is ended and the judgments of the honorable courts below can be none other than wrong.

We now reach the conclusion of our argument, for with the examination of the decisions of the various States upon similar acts of their legislatures there remains nothing more to be considered. These decisions are largely those upon which the learned Court of Appeals of the District of Columbia bases its judgment. Should we show that court to be mistaken in its understanding of these cases we will, we submit, have removed the last obstacle in our way to a decision of this honorable court in our favor.

It may be well to observe in connection therewith that the proposition upon which the learned Court of Appeals lays most stress is not our position. We do not dispute that it is the province of the court to interpret laws and of the jury to pass upon the facts; this is too elementary for question. We undoubtedly admit its correctness, maintaining, however, that the trial court in this case in the exercise of this province has wrongly interpreted a law by holding it to mean one thing when it distinctly says and means another. This is our position, and with these observations we pass to the decisions of the State courts.

There are similar statutes to this act of January 15, 1897, in the States of Alabama, California, Georgia, Illinois, Louisiana, Mississippi, and Utah (when a Territory).

ALABAMA.

The Alabama statute prescribes:

"Any person who is guilty of murder in the first degree must, on conviction, suffer death, or imprisonment in the penitentiary for life, at the discretion of the jury."

Alabama Criminal Code, section 3729.

In the case of Brown *vs.* The State, 109 Ala., pages 80 to 84, inclusive, the court was called upon to decide the same question as the one at issue, the trial court having instructed the jury, in part, as follows:

"While the jury are invested by the law with this discretion, the court charges you that it is a legal discretion, one which is a duty devolved upon the jury by the law to be exercised as a grave and solemn duty; and the jury in so determining the punishment may consider the character of the offense and the circumstances of its commission if it was committed by the defendant, and all the facts connected with or attendant upon the occurrence as shown by the evidence, and should then determine from a sense of duty which of the punishments so left to their discretion by the law is proper in the case and is best calculated to deter others."

The supreme court of Alabama in reviewing this instruction said:

"The true interpretation of this instruction, that which it was intended the jury should adopt and by their verdict effectuate, is that death should be affixed as the punishment unless they found in the facts and circumstances of the case some special or peculiar reason for fixing the milder punishment. * * * The instruction is not only erroneous in its construction of the statute to which it refers, but is an invasion of the province of the jury. * * * There is no more marked characteristic of the reformation of our criminal law, wrought and intended to be wrought by our penal code and its successors, than the abolition of capital punishment.

"It is never visited except by a jury on their own responsibilty, controlled by their own consciences, and it is not contemplated that the suggestion of their own consciences shall be directed by the judge presiding. * * * The discretion is legal in the sense that it is derived from and conferred by law, but it is not of the nature of a judicial discretion, which is said to be controlled by fixed legal principles.

"If such had been the discretion the law-makers contemplated, it is but a just presumption that judges, not juries, would have been clothed with it. The law-makers were not

unmindful of the constitution of juries nor of the varied considerations, thoughts, and sentiments which will govern them, the indulgence of which there is no purpose to forbid. It must have been foreseen and anticipated that there would be jurors reluctant to inflict capital punishment. * * * The presiding judge performs his whole duty when he informs the jury that the law commits to them the selection of the punishment which must follow conviction. The idea which seems to be shadowed out, if it is not distinctly expressed in the instruction, is that it is the duty of the jury to impose the graver punishment unless they find some reason in the peculiar facts of the particular case for the imposition of the milder punishment."

In this last case, however, it seemingly appears, although these words are those of the justice delivering the opinion of the court, and the only opinion delivered, that in this particular point the majority of the court did not agree, for which reason the case was cited by the Government at the hearing in the Court of Appeals of the District of Columbia. Nevertheless, the remaining judges composing the court of Alabama were content to allow the above expressions to be placed in the opinion of the court, and delivered no dissenting ones. Such quiet acquiescence on their part, we submit, can certainly be construed in no way against the appellant.

CALIFORNIA.

The California statute prescribes:

"Every person guilty of murder in the first degree shall suffer death or confinement in the State prison for life, at the discretion of the jury trying the same, or upon a plea of guilty the court shall determine the same" (sec. 190, Penal Code, as amended March 28, 1874).

Under this enactment there have been many decisions by the supreme court of California, and of the most important, shortly, as follows:

The first is that of The People *vs.* Welch, 49 California, 179, where the court says:

"Here their discretion is limited, at most, to determining which of two punishments shall be inflicted; and we think that it is still more restricted, and is to be employed only where the jury is satisfied that the lighter penalty should be imposed."

Nevertheless, the court's attention is respectfully called to the fact that it is not here laid down by what rule the jury is to be governed in their judgment, leaving it entirely with them to decide, in the exercise of their unlimited discretion, for the court further says:

"It would seem that, in view of the apparently growing disinclination to find verdicts of murder in the first degree, when the necessary result was capital punishment, and the existence of a feeling that there were nicer distinctions in the degree of malignancy exhibited in murders than were made by the letter of the statute definitions, the legislature intended to give to the jury, when the verdict was murder of the first degree, the power of relieving the defendant of the extreme penalty and of substituting another punishment in its stead. * * * We may say * * * that it was the purpose of the legislature, by amendment of section 190, to permit the jury, in a case where the facts proved brought the crime of the defendant within the statutory definition of the higher offense, but they believed the punishment of death too severe, to declare that he should be imprisoned for life."

It is respectfully submitted, where the jury is allowed to qualify its verdict "in a case where the facts proved brought the crime of the defendant within * * * the higher offense" (first-degree murder), their judgment certainly could not be in any way governed by mitigating or palliating circumstances; but, on the other hand, permission to so qualify their verdict, without any rule laid down with regard thereto, was a permission to do so in all cases at their discretion.

The next cases are The People *vs.* Jones, 63 California, 169; People *vs.* Murdock, 64 California, 371; People *vs.* Brick, 68 California, 190, and People *vs.* Olsen, 80 California, 128. All of these last-mentioned cases are short and ill-considered, basing their judgments, as they state, on the case of People *vs.* Welch, 49 California, 179, first above considered. While they seemingly hold contra to our contention, still, if their authority is the case of The People *vs.* Welch, this is impossible, as we have, in our consideration of that case, endeavored to show. Again, in The People *vs.* Murdock, 64 California, 371, the court said:

"With this power of discretion a court cannot interfere. The jury should be left entirely free to act according to their judgment."

Notwithstanding this last expression, the decision of the court seems to be the other way, but, as they are all so poorly considered, it is not safe to place much reliance upon them.

The question was again brought up and reargued before the supreme court of California in the case of The People *vs.* Bawden, 90 California, 197, and the court, after some little consideration, said:

"Appellant contends for a reversal on account of the instructions given by the court. * * * By these instructions the jury were told substantially that if they found the defendant guilty of murder of the first degree, and also found some extenuating facts or circumstances" (which your petitioner submits is a contradiction in terms), "it was within their discretion to relieve him from the extreme penalty of death by fixing the punishment at imprisonment for life; but that if the evidence did not show such extenuating circumstances, then they should allow the death penalty to be imposed. If the question here presented were a new one, there would be strong reasons for holding that by section 190 of the Penal Code the legislature intended to give to the jury the entire power of fixing the punishment in such a case uninfluenced by the court. * * *

But these instructions are literal copies of instructions given and approved by this court in People *vs.* Brick, 68 California, 190. * * * Therefore we decline to reopen the question, and hold that the instructions, under the authorities, were not erroneous. It is to be hoped, however, that trial courts will not make further excursions into this doubtful domain."

As to the case of People *vs.* Brick, referred to in this case, its authority is the case of People *vs.* Welch, 49 California, above cited and considered.

We come now to the last case on the subject decided by the California court, which is that of People *vs.* Kamaunn, 110 California, 613. In this case the court said:

"There was no error in refusing to instruct the jury as to how they should use the discretion given them in regard to the punishment in case they found the defendant guilty. This discretion is given to the jury, and the court cannot direct or advise them upon the subject further than to inform them of their function."

And to the same effect, it would seem, is the case of The People *vs.* Leary, 105 California, 495. We therefore submit that if ever such was the law in this State, the better judgment of that court, in the last two cases cited, has reversed the same; but we respectfully maintain that, taking the case of People *vs.* Welch, 49 California, 179, as the authority for all subsequent thereto, but prior to the last two cited, it cannot be in truth said to have been so decided, even in California.

GEORGIA.

The Georgia statute prescribes:

"The punishment for persons convicted of murder shall be death, but may be confinement in the penitentiary for life in the following cases: If the jury trying the case shall so recommend. If the conviction is founded solely on circumstantial testimony, the presiding judge may sentence to confinement in the penitentiary for life."

As in California, so under this enactment, there are quite a number of decisions by the supreme court of Georgia. But, before we proceed to these, there is another decision by the supreme court of this State under a similar statute which is referred to in all, or nearly all, of the cases under the enactment above set out. It is the case of Johnson *vs.* State, 58 Georgia, 491, which was a prosecution for the larceny of a cow and is punished under the Georgia statutes by confinement in the penitentiary from two to four years, "unless the jury trying the case shall recommend the prisoner to mercy; in which event he shall be punished * * * not more severe than the chain gang; fine of a thousand dollars and imprisonment six months." The court in this case, 58 Georgia, 491, says:

"So that a recommendation to mercy grades this offense as less than felony, keeps the prisoner out of the penitentiary, and is a great right to which the defendant is entitled by law. What is that right? It is a right for the jury to say whether he shall be sent to the penitentiary or not. Under what circumstances? Under all circumstances. The law does not limit it to a case of mitigating circumstances or any peculiar circumstances whatever. * * * It is lodged, too, by the General Assembly, whether wisely or not we are not called upon to say, in the jury, and not in the judge.

"Ordinarily, punishment, its degree and extent, is vested in the court, * * * but the statute in these offenses vests it in the jury, to the extent of saying that this man shall not go to the penitentiary. Whether they ought not to be merciful, is for them to say, independently of directions from the court as to the circumstances which would justify them in so saying."

The first case under the Georgia statute in regard to murder is that of Hill *vs.* State, 72 Georgia, 132, where the supreme court said:

"The court below instructed the jury: 'If you find this defendant guilty, then you have a right under our law

either to find him guilty without recommendations, or you have the right if you find him guilty to recommend that he be punished by imprisonment in the penitentiary for life. If you find him guilty, it is for you to consider the case and say whether it is a proper case for that or not. You are not to be governed in that instance by your sympathies, but by your judgment, to say whether or not it is such a case as it ought to be done. You must be governed by your judgment, approved by the evidence * * * in the case and the law applicable to it, and then to say what is your duty as twelve upright sworn jurors.' * * * This statute leaves it in the discretion of the jury as to whether they will recommend imprisonment for life in the penitentiary of a person convicted of murder. It is not limited or circumscribed in any respect whatever. This law does not prescribe any rule by which the jury may or ought to exercise this great discretion. It does not say that the jury are not to be governed by their sympathies, and that they are to be governed by their judgment, as instructed by the court below. The court below imposed by its charge restrictions upon the jury unauthorized and unwarranted by the statute."

In the next case, Inman *vs.* State, 72 Georgia, 280, the instructions of the lower court were similar to those in the case last cited, but the supreme court on review saw a distinction, holding as follows:

"We do not think that the language used by the court was calculated to deprive, circumscribe, or restrict the jury in the exercise of their rights to recommend that the accused be imprisoned for life in the penitentiary; in this respect it differs from Hill *vs.* State, decided at the last term of the court.

"Yet we think in cases like this the better practice would be for the court to call the attention of the jury to the law, and merely state to them, if they thought proper they might, in addition to the verdict of guilty, recommend that the defendant be imprisoned in the penitentiary for life. This was substantially done by the court in this case."

So, too, in the next case, Valentine *vs.* State, 77 Georgia, 481, the court said:

"The distinction taken between the case of Hill *vs.* State and Inman *vs.* State also exists here;"

and further on, referring to the case of Johnson *vs.* State, 58 Georgia, 491, said:

"Moreover, the charge in that case confined the right of the jury in this, that the court charged that if there were no circumstances to justify you in recommending him to the mercy of the court, 'Why, then, you ought not to do it.' Such a charge as that would be error under the statute in respect to punishment for murder, because it said to the jury that they ought not to recommend to mercy unless such and such was proved."

And in the last case in Georgia, *i. e.*, Thomas *vs.* State, 89 Georgia, 480, it is held that "such recommendation is in all cases matter of discretion with the jury."

ILLINOIS.

The statute in this State prescribes:

"Whoever is guilty of murder shall suffer punishment of death, or imprisonment in the penitentiary for his natural life, or for a term not less than fourteen years. If the accused is found guilty by a jury, they shall fix the punishment by their verdict."

In the two Illinois decisions under this act, Nowacryk *vs.* State, 139 Illinois, 336, and Fletcher *et al. vs.* State, 117 Illinois, 184, the question was whether testimony of mitigating facts could be given in evidence by the accused in order that the jury might qualify their verdict, and the supreme court of that State very properly held that although the character of the testimony was such as to render it inadmissible at the trial under common-law rules, still under the act it was

proper for the purpose of allowing the jury to qualify their verdict if they deemed proper.

It is submitted that it is too plain for argument, such a rule goes no further than for the benefit of the accused and cannot be construed, *e converso*, to preclude the jury from qualifying their verdict in a case where there may not be such evidence. For, in the case of Fletcher *vs.* State, 117 Illinois, 184, above cited, the court says:

"In the contemplation of this statute there may be every technical element of murder existing, and yet the circumstances be such that the jury would be justified in imposing punishment by confinement in the penitentiary for fourteen years only."

LOUISIANA.

The Louisiana decisions have been considered, so we will not consider them here.

MISSISSIPPI.

The Mississippi statute prescribes:

"That in all cases when any person or persons upon conviction of crime shall or may be punished with death, the jury may, in their discretion, in their verdict, declare that the penalty, or punishment, shall be imprisonment in the penitentiary for life; but if the jury shall omit to so declare the penalty in their verdict, then the court shall pronounce the death penalty."

Mississippi Acts, 1875, page 79.

Under this statute in the case of Spain *vs.* The State the trial court instructed the jury as follows:

"If the jury simply find the accused guilty as charged in the indictment it will be the duty of the court to pronounce the death penalty; but if the evidence in the case warrants them in so doing, they may find him guilty as charged, 'and declare that the punishment to be inflicted shall be imprisonment in the penitentiary for life,' or they may find the defendant not guilty."

The supreme court of Mississippi, in reviewing the correctness of this instruction on appeal in the above case, said:

"The judgment must be reversed because of the second instruction given at the instance of the State. It limits and qualifies the right of the jury to affix the punishment at imprisonment for life, whereas the law confers on the jury this right without qualification or restriction. The right of the jury to fix the punishment as indicated is without any condition. The most atrocious crime committed under the most aggravating circumstances may be punished by imprisonment for life instead of by death if the jury so determine by its verdict. The law demands a jury willing to be the instrument of visiting the penalty of death, and confers on such jury the unconditional right to fix the punishment at imprisonment for life. It was erroneous to instruct the jury that its right was dependent on any state of the evidence or any view it might take of it."

UTAH.

In Utah a somewhat similar statute prevails—*i. e.:*

"Every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the court."

Having examined all the decisions of the various States under similar statutes, we have reserved for the last the decision of this honorable court cited and relied upon by the Government in its brief before the Court of Appeals, viz., Calton *vs.* Utah, 130 U. S., 86.

That decision was simply this: The trial court went to the other extreme and did not so much as inform the jury that such a statute existed, or of their rights under it, and of course this court held it error. We wish to direct attention to what this court said in that case as holding the doctrine for which we here contend:

"The statute evidently proceeds upon the ground that there may be cases of murder in the first degree, the pun-

ishment for which by imprisonment for life at hard labor will suffice to meet the ends of justice."

We submit there is nothing said about mitigating circumstances, but, on the other hand, the jury are restricted, if at all, only to that which "will suffice to meet the ends of justice," leaving it to them to say what will in each case accomplish this. Proceedings, this court says:

"The jury to whom the statute commits the determination of that question, at least in part, were not informed of their duty and responsibility."

Here it is desired to direct the court's attention to the provision in the Utah statute which places the punishment, even after a recommendation by the jury, "at the discretion of the court." Can it not be inferred from this language of your honors, had the Utah statute been as the one in question, with no discretion in the court upon a recommendation by the jury, that this court would have construed that statute to have committed the determination of the punishment to the jury not "at least in part," but in the whole, and that the statute under consideration should be so construed?

In consequence of the foregoing it is respectfully submitted that, whatever premises may be assumed, the conclusion reached is that the court below erred in affirming the instructions given by the trial court; therefore it is respectfully asked that the judgment be reversed.

F. S. KEY SMITH,
Counsel for Plaintiff in Error.

Nos. 431, 432, 433.

NOV 25 1898
JAMES H. McKENNEY
CLERK

Brief of Atty. Gen. David Boyd for U. S.

Supreme Court of the United States.

OCTOBER TERM, 1898.

Filed Nov. 25, 1898.

CHARLES WINSTON, *Petitioner*,
vs.
THE UNITED STATES. } No. 431.

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF IN BEHALF OF THE RESPONDENT.

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF IN BEHALF OF THE RESPONDENT.

These are criminal cases arising in the supreme court of the District of Columbia. Each of the petitioners was indicted and convicted of murder in the first degree, and on appeal to the Court of Appeals of the District of Columbia the judgment of the lower court, in each case sentencing the petitioner to death, was affirmed. The cases are brought

here by certiorari, and by stipulation of counsel the petition in each case, together with the transcript of the record of proceedings in the Court of Appeals of the District of Columbia, is taken for the return to the writ and, as stated, the record in the case.

STATEMENT OF THE CASES.

In the first case, that of Winston, the facts are as follows:

On the 10th of February, 1898, Winston was indicted for murder, it being averred in the indictment that on the 13th day of December, 1897, he wilfully, feloniously, and of his malice aforethought shot and killed one Emma Winston. To this indictment he pleaded not guilty, and on March 8, 1898, after trial had, the jury rendered a verdict of guilty as indicted. Emma Winston was the wife of the accused, and they lived together at No. 521 Third street southwest, in this city, where they occupied an upstairs front room. About nine o'clock in the morning of the day of the killing the deceased went to her room, where the accused was. All was quiet until about twelve o'clock noon, when there was a pistol shot, the sound coming from the upstairs front room, and the voice of Emma Winston was heard crying, "Lord, have mercy!" followed by the sound of other shots. Evidence was given tending to show that threats had been made by the accused against the deceased, and that he had once served a term in jail for threatening her. On page 4 of the record in 431 is a description of the wounds inflicted on the deceased, and on page 5 is recited by the officer who made the arrest of Winston the condition of the room when he entered it. Evidence was also given tending to show that the accused was himself badly wounded, and while at the hospital admitted that he shot himself, and said that he thought he had killed his wife. The accused took the stand in his own behalf, admitted that there had been no quarrel

between himself and wife, and that they lived happily together, and gave a version of the shooting which is fully set out on page 6 of the record, and thereupon rested his case. The justice presiding at the trial thereupon charged the jury as to the law of the case, and on pages 7 and 8 of the record will be found what the court said to the jury in regard to the act of Congress of January 15, 1897; to which portion of the court's charge the accused, by his counsel, duly excepted.

In the Strather case the facts are as follows:

Strather was indicted on the 31st day of December, 1897, for murder, it being charged that he wilfully, feloniously, and of his malice aforethought killed one Rosa Talbert on the 15th day of October, 1897, with a hatchet. To this indictment he pleaded not guilty, and the case was duly tried, and on the 10th of February, 1898, a verdict of guilty as indicted was rendered. The evidence showed that the accused and Rosa Talbert had been living together as man and wife; that the woman was the wife of another man; that she and the accused usually spent their nights together at a room rented by him; that for several nights prior to the homicide the woman failed to join him, and he threatened to kill her; that on the night of the homicide they occupied the same room, and the next morning, very early, the occupants of the lower rooms heard an unusual noise in the accused's room and summoned a policeman; that upon entering the room the policeman asked him what was the matter, and he replied that he reckoned it was a case of murder; that the woman was lying crosswise of the bed, dead, with six wounds upon her head, four of which went into the brain substance and were necessarily fatal; that the wounds were probably made with a hatchet such as the one produced at the trial, which, blood-stained, was found in the room. On page 4 of the record in No. 432 will be found a full description of the wounds inflicted. The accused, in

order to maintain and prove his side of the case, produced several witnesses and took the stand himself. His witnesses gave evidence tending to prove his previous good reputation as a peaceful and law-abiding citizen, the deceased's previous reputation as a quarrelsome and violent woman, and that the deceased had on previous occasions assaulted the accused, and that on one occasion she had cut him with a penknife, and had previously threatened his life, and that he knew of such threat; that there had been a quarrel between the deceased and the accused on the morning of the homicide; that upon the arrest of the accused, immediately after the homicide, there was a bleeding wound upon his face. The accused himself testified that the wounds in the head of Rosa Talbert were inflicted by him with a hatchet. He denied, however, that he had ever threatened her life, and claimed that when he struck the woman with the hatchet he was in fear of his own life, and that the wounds were inflicted by him in the heat and excitement of the quarrel and while he was suffering pain from a blow of the deceased on his left jaw. And thereupon the defense closed its testimony. Certain prayers were offered by the accused, which appear on pages 5 and 6 of the record in No. 432. All of these prayers were objected to by the Government, and the objections sustained. The refusal of the court to grant the prayers was merely a refusal to grant them "as asked and without modification." The court thereupon charged the jury at length upon the law of the case, and the only part of the charge that is objected to is what the court said to the jury as to its right under the act of January 15, 1897, which part of the charge appears on pages 11 and 12 of the printed record in No. 432.

In the Smith case the facts are as follows:

Smith was indicted on the 31st of December, 1897, for murder. The indictment charges that on the 15th day of November, 1897, Smith feloniously, wilfully, and of his

malice aforethought caused the death of one Edmonia Jackson with a hatchet. To this indictment he pleaded not guilty, and the case came on for trial. On the 17th of February, 1898, the jury rendered a verdict of guilty as indicted. At the trial evidence was given on behalf of the prosecution to show that the dead body of Edmonia Jackson, a colored woman, about thirty-three years of age, was found lying crosswise of a bed in the corner of the first-floor front room of premises 124 Madison alley northwest, in this city; that on the floor by the bed was found a hatchet covered with blood and containing some particles of hair of a colored person; that at the autopsy performed the day after the finding of the body, which was Friday, November 19, it was developed that the body was in a condition that indicated that the woman had been dead four or five days; that there was a transverse incised wound on the throat about four or five inches long, not very deep, evidently made with a sharp instrument, and two wounds in the back of the neck, to the right, the upper one immediately below the base of the skull, partly separating the skull from the vertebral column; that the wounds in the neck had the appearance of having been made with a hatchet, and were fatal; that there was also a cut in the palm of the right hand about two inches long, in which there was embedded a portion of the blade of a shoemaker's knife; that the portion of the knife found in the wound fitted a broken knife found in the accused's room. The Government further gave evidence tending to show that the Jackson woman lived at premises 124 Madison alley, with her husband; that the accused rented the first floor front room from her; that the accused and the woman's husband had a quarrel about her, and that both were arrested upon charges of assault and sent to jail; that the night before Smith was tried for the assault he threatened to kill Edmonia if she ever resumed living with her husband; that while in jail Smith saw her when she visited her husband

and said to other prisoners that he would fix her when he got out; that "it would be another case of Strather;" that when his term expired, on the 10th of November, 1897, some of the prisoners bade him good-bye, and he said they need not do that, because he would be back in a few days, but would be on the other side of the jail (referring to the side where serious offenders are confined); that when Smith was released he went to his room in Madison alley; that on the 13th of November Edmonia wanted to go to jail to see her husband, who was still there, but Smith prevented her from going; that on Monday, the 15th, he again forbade her to go to the jail; that Edmonia went to the jail that day and returned about four o'clock in the afternoon; that when she returned she had a quarrel with Smith about her visit to the jail, and about five o'clock in the afternoon she was in Smith's room and he was quarreling with her; that between six and seven o'clock she was seen going into Smith's room with him and was not seen alive after that; that about twelve o'clock that night the neighbors in the alley heard a loud sound, as of some one falling, and soon thereafter heard the front door of 124 open and some one pass up the narrow alleyway to the hydrant in the back yard and turn on the water; that about fifteen minutes later the water was turned off, and the person returned and entered premises No. 124; that on Tuesday, the 16th of November, Smith told Martha Williams, a friend of Edmonia's, that Edmonia had left the house about ten o'clock that morning to go to a service place; that afterwards he gave the Williams woman an address, and when she told Smith that she could not find Edmonia he gave her another address and told her that she need not bother about going there, that Edmonia would be home in a few days.

The Government further gave evidence tending to show that Smith was about premises 124 Madison alley every day from Tuesday until Friday, and was also there every night; that on the night of the 17th one of his neighbors walked

home with him and took the key to open the door leading into the room where Edmonia's body was found, and offered to go into the room with Smith, and that Smith refused to permit him to enter the room and went in alone; that after his arrest Smith told conflicting stories to the officers of his whereabouts from Monday until Friday, and that after his return to the jail he stated to prisoners there that he had killed the Jackson woman. And here the prosecution rested.

Evidence was given on the part of the accused to show that Mrs. Jackson had not visited the jail at the times prisoners at the jail said she was there, at which times they testified Smith made threats against her. And there the defendant rested.

The only exception in the case raises the same question as in the Winston case.

ARGUMENT.

As appears from inspection of the records, in each of the three cases the exceptions taken in the trial court are substantially the same, except that in the Strather case—No. 432—there are several exceptions to the refusal of the court to grant certain prayers not asked by the other petitioners on their trials. For convenience of treatment, the Strather case is first considered with respect to the exceptions not involved in the other cases.

I.

The Special Exceptions in the Strather Case.

1. The first prayer (Rec., p. 5) is faulty in that it does not correctly set out the law of self-defense, and if granted as asked it would have left the jury to believe that the defendant himself, and not the law, was to determine when

he could take the life of another. It ignores the fact that the apprehension or fear of his life or great bodily harm that excuses one for taking the life of another must be a reasonable fear or apprehension.

2. The second prayer (*ibid.*) is faulty, in that it does not fully define manslaughter, and would lead one to believe that one has a right whenever he has received a blow immediately to avenge it by taking life, without any reference whatever to the character of the blow and the situation of the parties, nor does it in any way enlighten the jury as to the degree of provocation essential to excuse anger and reduce a killing from murder to manslaughter. The same might be said of the third prayer (*ibid.*), which uses the words "in the heat of blood or immediate provocation" without in any way defining either of the terms, and ignoring the principle of law that the provocation must be such as to excite the passion of a reasonable man before it can operate to reduce a crime from murder to manslaughter.

3. The fourth prayer (*ibid.*) is erroneous in that it fails to state that the provocation under which the defendant was smarting at the time he inflicted the fatal blow must have been such as would have reasonably excited his anger and resentment.

4. The fifth prayer (Rec., p. 7) relates to the act of Congress of January 15, 1897, and will be hereafter considered.

5. The sixth prayer (*ibid.*) is uncertain and ambiguous and appears to have been intended for a prayer telling the jury that unless they believe certain facts beyond a reasonable doubt they should not convict the defendant of murder; but the prayer is defective in that it does not fully nor clearly set out the law in respect of the doctrine of reasonable doubt.

The court's attention is asked to the fact that the presiding justice at the trial refused to grant these prayers "as asked and without modification," and in his charge fully covered the law of murder, manslaughter, and self-defense, and to his instruction on these points no exceptions were taken by Strather's counsel. On pages 7 and 8 of the record will be found the charge of the court, wherein murder is fully and correctly defined to the jury, and on pages 8 and 9 will be found what the court below said in reference to manslaughter and self-defense.

It is submitted that Strather was not prejudiced by the refusal of the court to grant the prayers asked in his behalf, which were bad in law and were not based upon the evidence in the case, particularly as the court of its own motion fully, fairly, and correctly instructed the jury upon the points mentioned in the prayers; to which instruction of the court there was no exception.

"The charge of the court having correctly defined the law of the case, the refusal of the defendant's prayer would not have been error, even had it been technically correct and applicable."

Travers *vs.* U. S., 6 App. D. C., 450.

6. We consider next the contention made by the petitioner in case No. 432, that section 5339, Revised Statutes of the United States, is not in force in the District of Columbia, and that therefore the act of January 15, 1897, which amends that section, is not in force. The object of this contention is to establish the propositions, first, that section 5339 of the revision is not in force in the District of Columbia; second, that the act of January 15, 1897, amending that section is therefore not in force in the District; and, third, that the punishment of murder in the District of Columbia must therefore depend upon the laws of Maryland as they stood at the time of the creation of the District of Columbia.

In the case of the United States *vs.* Guiteau, 1 Mackey, 529, 530, the supreme court of the District of Columbia, speaking by Mr. Justice James, held that the statute of 1871 (16 Stats., 419), which enacted that the laws of the United States not locally inapplicable shall have the same force and effect in the District of Columbia as elsewhere in the United States, amounted to a substitution or amendment of the existing laws of the District of Columbia and related to section 5339 and gave that section force and effect in the District, even though it were not in force before that time. The opinion of Mr. Justice James goes into the whole matter, and the decision holds that section 5339 is applicable to the District of Columbia, and that the indictment against Guiteau was properly drawn under that section.

The Court of Appeals of the District of Columbia has often been called upon to determine whether general acts of Congress are applicable to the District of Columbia, and in accord with the ruling of this court in the case of Page *vs.* Burnstine (102 U. S., 664), and of the supreme court of the District of Columbia in the Guiteau case, has invariably held that acts of Congress relating generally to the Territories or other places over which the United States has exclusive jurisdiction apply to the District of Columbia.

Chase *et al. vs.* U. S., 7 App. D. C., 149.

The same Court of Appeals, in the case of Fearson *vs.* The United States (10 App. D. C., 536), refused to decide whether the act of January 15, 1897, was in effect in the District of Columbia, it not being necessary in that case to decide the question.

Our contention is that should this court adopt the suggestion of counsel for the petitioner in case No. 432, everything that was said in reference to the qualification of the jury's verdict was unwarranted, and the court below in telling the jury of the existence of the law gave the petitioner

the benefit of its provisions, when, in fact, the law was not in force and the petitioner not entitled to its benefits. If it be that section 5339, Revised Statutes of the United States, has no application to the District of Columbia, it is not necessary for us to go further in these cases, because section 2 of the act of January 15, 1897, could have no reference to the crime of murder punishable in the District of Columbia by virtue of a law derived from Maryland. In the first place, the cession act of 1801, which enacted that the laws of Maryland as they existed at the time should continue in force as a part of the law of the District of Columbia, in no way made the law of Maryland an act of Congress, but merely stated that the law of Maryland should be in effect in the District until Congress by an express enactment should repeal the same. Independently of this act of 1801, the Maryland law would have been in existence; so that the act of 1801 in reality gives no vitality to that law. Now, in section 2 of the act of January 15, 1897, which in certain cases abolishes the punishment of death and prescribes in lieu thereof the maximum punishment of imprisonment for life at hard labor, it is provided:

"That except offenses mentioned in section fifty-three hundred and thirty-two, thirteen hundred and forty-two, sixteen hundred and twenty-four, fifty-three hundred and thirty-nine, and fifty-three hundred and forty-five, Revised Statutes, when any person is convicted of any offense to which the punishment of death is now *specifically affixed by the laws of the United States*, he shall be sentenced to imprisonment at hard labor for life, and when any person is convicted of an offense to which the punishment of death, or a lesser punishment, in the discretion of the court, is affixed, the maximum punishment shall be imprisonment at hard labor for life."

It will thus be seen that this section applies only to offenses to which the punishment of death is now *specifically affixed by the laws of the United States*, and could have no ap-

plication to cases where the punishment of death was inflicted under the laws of the State of Maryland.

II.

The Exceptions Relating to the Act of January 15, 1897.

The portion of the act in question which is involved in the exceptions taken by the three petitioners alike is as follows:

"That in all cases where the accused is found guilty of the crime of murder or of rape under sections fifty-three hundred and thirty-nine or fifty-three hundred and forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto the words 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life."

29 Stats., 487.

And the language of the court in instructing the juries respecting this act in the several cases is as follows:

In the Winston case the court, after informing the jury of the existence of the act of Congress allowing them to qualify their verdict by adding thereto "without capital punishment," said (Rec., pp. 7, 8):

"Counsel has endeavored to impress upon the jury the fact not only that this right exists, but that it is the duty of the jury to so qualify their verdict in every given case; that because they have the opportunity of extending mercy, therefore the duty follows the right; *that because it is your privilege or opportunity to qualify the verdict by adding the words 'without capital punishment,'* it is your duty so to do. But the law was not so intended, gentlemen of the jury. It was intended to serve some useful purpose. There are many shades of circumstances that make up the crime of murder in different cases. In some instances the circumstances might be such as to bring the crime within the

definition of murder, and yet those circumstances might not indicate that degree of wantonness, wilfullness, and heinousness that the circumstances in other cases would indicate. I think that it was intended by Congress that in cases where the crime is clearly murder within the definition of the crime of murder, and yet there are circumstances which tend to mitigate the offense—palliating circumstances that tend to show that the crime is not heinous in its character—the jury may add the words 'without capital punishment,' and the law then makes the penalty imprisonment for life.

"That qualification cannot be added unless it be the unanimous conclusion of the twelve men constituting the jury. I think that it should not be added unless it be in cases that commend themselves to the good judgment of the jury—cases that have palliating circumstances which would seem to justify and require it.

"The penalty for the crime of murder has not been abrogated by Congress. The law-making power has seen fit to allow that penalty to remain, and it is only in those cases where the circumstances indicate to the jury that propriety and the necessity, perhaps, or the duty of making such qualification that the jury should add the qualifying words 'without capital punishment.' In all other cases the law speaks. The jury need not qualify the penalty. It is not their duty to qualify it. It is their right and privilege in a proper case to qualify it. But you are not responsible for the law, nor am I. Neither are you responsible for the fact that you are brought here to try this case. If the defendant did not commit this crime, he should be returned by your verdict not guilty. If he did commit the crime, then he is responsible for these conditions, not you. Your simple duty is to declare whether he is guilty or not guilty. If guilty, then your verdict should be either guilty as indicted or guilty with the qualification."

In the Strather case the court said (Rec., pp. 11 and 12):

"If you should reach the conclusion, gentlemen of the jury, that your verdict should be guilty as indicted, *it is your right*, under a recent act of Congress, passed in January, 1897, to add to this verdict 'without capital punishment.'

"As I had occasion to remark yesterday, the jury have

this power in any given case. *The court cannot control your act at all. The court can only advise you as to the law. The responsibility is entirely with you, and you can render such verdict as you please. I mean that you have the power to do it.* You can render a verdict of not guilty in a case where the evidence clearly shows guilt. Of course, such action on the part of the jury would be a direct violation of their oaths. If the jury believe a man was guilty, and simply out of pity or sympathy or mercy render a verdict of not guilty, they would violate their oaths.

"I have no doubt that this act of Congress was intended to serve some useful purpose. The penalty for murder has not been disturbed by this act of Congress; it is fixed by law; the jury neither make nor unmake it."

The court then informed the jury of his idea of the object of the law, but stated that what he said was merely as an illustration; and then said:

"But the object of this penalty, gentlemen of the jury, is to protect society, and the jury should not interfere with it under any circumstances, unless the circumstances are such as to satisfy them that this provision should be added to the verdict."

And then the court, further on in the charge, said that, after they had reached the conclusion of the guilt of the defendant (if they reached that conclusion), the question that they were to ask themselves was this:

"Are the circumstances in the case such (if you reach the conclusion that the defendant is guilty as indicted) as to require you upon your oaths to interfere with the penalty fixed by law? * * * *The responsibility of the outcome of this case is with you entirely. The court cannot help you any further.* You are not responsible for the law. The law has been made by the Congress of the United States and has received the approval of the Chief Executive. It was made for your protection and for mine. * * * Now, gentlemen, take this case and dispose of it, considering simply the law and the evidence you have heard, being actuated by no motives whatever, either of revenge or sympathy. Do justice between this man and the United States."

In the Smith case, in instructing the jury in regard to this act of Congress, the court said (Rec., pp. 7 and 8):

"Under a recent statute the jury are authorized, in returning a verdict of guilty of murder, if the evidence justifies them on their consciences in so doing, to qualify their verdict by the addition of the words 'without capital punishment.'

"The law inflicting the penalty of death for murder has not been repealed—that is, the penalty which the law fixes. * * * The legislature probably intended that in cases where there were some mitigating or palliating circumstances, where it was apparent from the evidence that the crime was not the most heinous crime of murder, or where there was a doubt whether the circumstances indicated premeditation, perhaps, that the jury might qualify their verdict by adding the words 'without capital punishment.' But it was evidently contemplated by Congress that there would be cases in which juries would not be justified in so qualifying their verdicts, and therefore the law remains, and unless the verdict is so qualified the penalty of the law is unchanged."

And then the court, after telling the jury that they were not responsible for the law, nor for the act of the individual who placed himself within the law, and that the duty rested upon them to say whether the defendant was guilty or not, said that if they found the defendant guilty they should return a verdict of guilty as indicted, adding, in conclusion, "*whether you qualify it or not is a matter for you to determine.* If you conclude to qualify it, it must be by the unanimous decision of the twelve jurors."

The contention of counsel for the several petitioners is that the trial court had no right to say to the juries anything concerning the act of January 15, 1897, except that it existed.

While in the Smith case what the court said on the subject of this statute would appear to have been said by the

court of its own motion, such was not the fact in the Strather and Winston cases.

Counsel for Strather invited the court to instruct the jury as to the effect of the act when they asked the court in their fifth prayer to tell the jury that if they found the defendant guilty they could return a verdict of guilty without capital punishment, "no matter what the evidence may be;" and in the Winston case the counsel for the defendant endeavored to impress upon the jury that not only did they have the right to qualify their verdict, but that it was their duty to so qualify it in every given case, and the court merely informed the jury what he thought was intended by the act, leaving them in each case perfectly free to exercise the right of qualification if they saw fit, telling the jury in each case that they were to determine the verdict, and not undertaking to decide anything for them.

A further objection is made to the charge of the court in the Winston case, that the court should not have informed the jury that the addition of the words "without capital punishment" must be by the unanimous consent of the jury; but in so doing the court only informed the jury what the law is—that is, in a criminal case the verdict of the jury must be unanimous.

The statute under consideration has not as yet received the judicial consideration of an appellate court, except the Court of Appeals of the District of Columbia in passing upon these cases, and nowhere do we find a statute exactly similar to it.

In several States of the Union laws have been passed allowing the jury in some cases to qualify the verdict and in others to fix the penalty, and while there are some differences among the authorities in construing the several acts, that difference arises either because the facts of the cases themselves are different, or because there is some statute that limits the authority of the court to instruct the jury, or

because the jury is to determine by their verdict the punishment, and has not merely the right, as given by the statute, to qualify the verdict if they think proper, thereby preventing the general sentence of death from being imposed. In this jurisdiction a court in instructing a jury proceeds under the common law, and has full power and authority to instruct the jury as to the law of the case and to comment upon the facts.

Statutes somewhat similar to that under consideration have been passed in the following States, the decisions in which States will be considered in the order given, namely: Alabama, California, Georgia, Illinois, Louisiana, and Texas.

In *Alabama* the statute reads:

"Any person who is guilty of murder in the first degree must on conviction suffer death or imprisonment in the penitentiary for life, at the discretion of the jury."
Cr. Code, 3729.

In considering this act the supreme court of Alabama in the case of Brown *vs.* The State, 109 Ala., 70 (decided in 1895), held the following charge proper:

"The court charges you that it is a legal discretion, one which is a duty devolved upon the jury by the law, to be exercised as a grave, solemn duty, *and the jury in so determining the punishment may consider the character of the offense and the circumstances of its commission, if it was committed by the defendant, and all the facts connected with or attendant upon the occurence* as shown by the evidence, and should then determine from a sense of duty which of the punishments so left to their discretion by the law is proper in the case and is best calculated to deter others from the commission of like offenses, and to protect the community from the perpetration of like offenses by others."

It will be seen that the jury were to fix the penalty under the above-quoted statute, but the court held that that discretion was a legal discretion. In this jurisdiction, as stated

by the Court of Appeals in the Fearson case, the punishment for murder is death, and that law has not been repealed; but there has been merely added thereto a right in certain cases for the jury to qualify their verdict; and, as said by this court in the case of Calton *vs.* Utah, considered below, they should consider the circumstances of the case when they so qualify their verdict.

In *California* the statute reads as follows:

"Every person guilty of murder in the first degree shall suffer death or confinement in the State prison for life, at the discretion of the jury trying the same."

Penal Code, sec. 190, as amended by act of March 28, 1874.

This statute was first considered by the supreme court of California in the case of People *vs.* Welch, 49 Cal., 174 (decided in 1874). In that case the court, speaking (p. 179) of the discretion mentioned in the statute, uses the following language:

"The nature of that discretion is to be ascertained by reference to the language of the statute. In Virginia it was held, that in an action *qui tam* the verdict should fix the amount of damages (Scott's case, 5 Grat., 697). Also, that where the duty was imposed on the jury of fixing the term of imprisonment, and the verdict did not ascertain such term, it should be set aside (Mills' case, 7 Leigh, 751).

"But the act amending section 190 of the Penal Code does not give the general discretion which juries exercise under the Virginia statute. Here their discretion is limited, at most, to determining which of two punishments shall be inflicted; and we think that it is still more restricted, and is to be employed only where the jury is satisfied that the lighter penalty should be imposed. It would seem that, in view of the apparently growing disinclination to find verdicts of murder in the first degree, when the necessary result was capital punishment, and the existence of a feeling that there were nicer distinctions in the degree of malignancy exhibited in murders than were made by the letter of the

statute definitions, the legislature intended to give to the jury, when the verdict was murder of the first degree, the power of relieving the defendant of the extreme penalty, and of substituting another punishment in its stead."

This case is of especial significance, in view of the fact that in the course of its opinion, and on the same page of the report, the court quotes the statute of Louisiana, upon the consideration of which by the supreme court of Louisiana counsel for the appellants principally rely. Referring to its own statute, the California court says:

"A verdict fixing the punishment at imprisonment for life is somewhat analogous to the French verdict, 'Guilty with extenuating circumstances,' and is the equivalent of the Louisiana verdict, 'Guilty without capital punishment,' held good in State *vs.* Rohfrischt (12 La. An., 332), and authorized by the statute which provides, 'In all cases where the punishment denounced by law is death, it shall be lawful for the jury to qualify their verdict by adding thereto, "without capital punishment." And whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to hard labor for life in the State penitentiary.' (Rev. Stat. of La., p. 163.)"

The California statute was further considered by the supreme court of that State in the following cases:

People *vs.* Jones, 63 Cal., 168, decided in 1883.
People *vs.* Murback, 64 Cal., 369, decided in the same year.
People *vs.* Brick, 68 Cal., 190, decided in 1885.
People *vs.* Olsen, 80 Cal., 122, decided in 1889.
People *vs.* Bawden, 90 Cal., 195, decided in 1891.
People *vs.* Leary, 105 Cal., 486, decided in 1895.
People *vs.* Kamaunu, 110 Cal., 609, decided in 1895.

In no one of the later cases is the authority of People *vs.* Welch impugned. In the case of People *vs.* Brick the court held the following instruction proper:

"If the evidence shows the defendant to be guilty of murder in the first degree, *but does not show some extenuating fact or circumstance*, it is the duty of the jury to find a simple verdict of guilty of murder in the first degree and leave to the law the responsibility of fixing the punishment."

In passing on this instruction the court says (68 Cal., 192):

"There is in this instruction no error. The discretion given the jury by the statute is not an arbitrary one, but is to be employed, as said by this court in People *vs.* Welch, 49 Cal., 179, 'only where the jury is satisfied that the lighter penalty should be imposed.' Of course, the jury could only be satisfied by the facts and circumstances of the case."

In the case of The People *vs.* Bawden, the court uses this language (90 Cal., pp. 197, 198):

"Appellant contends for a reversal on account of the instructions given by the court, numbered 23, 24, and 25. By these instructions the jury were told, substantially, that if they found the defendant guilty of murder in the first degree, and also found some extenuating fact or circumstance, it was within their discretion to relieve him from the extreme penalty of death by fixing the punishment at imprisonment for life; but that if the evidence did not show such extenuating circumstances, then they should allow the death penalty to be imposed.

"If the question here presented were a new one, there would be strong reasons for holding that by section 190 of the Penal Code, the legislature intended to give to the jury the entire power of fixing the punishment in such a case, uninfluenced by the court; and that there is no warrant in the code for any distinction in this regard between one kind of murder in the first degree and another. But these instructions are literal copies of instructions given and approved by this court in People *vs.* Brick, 68 Cal., 190. The same rule was also substantially stated in People *vs.* Jones, 63 Cal., 168; and in People *vs.* Murback, 64 Cal., 369, the language of the instructions approved was almost identical with that used by the court in the case at bar, although it may be said that in the Murback case the opinion of the court was hardly

in consonance with the instructions approved. The same rule seems to have been approved in People *vs.* Olsen, 80 Cal., 128.

"Similar instructions have no doubt been given in other cases now on their way here by appeal; for it is to be observed that whenever a doubtful instruction has been approved by this court, it has generally been seized upon and injected into future cases. Great confusion would therefore occur if we should enter into a new examination of this question, and should come to a conclusion opposite to that heretofore reached. Moreover, as was said by the court, on another subject, in People *vs.* Myers, 20 Cal., 520, 'we do not think this question has practically so much importance as is sometimes attributed to it'; for a juror, exercising the responsibility of choosing between the imprisonment of a defendant and his death, will act upon his own discretion, and not upon that of another. Therefore, we decline to reopen the question, and hold that the instructions, under the authorities, were not erroneous. It is to be hoped, however, that trial courts will not make further excursions into this doubtful domain."

And the contention on the part of the appellants that the later cases of People *vs.* Leary and People *vs.* Kamaunu overrule the earlier cases is not well founded. In the Leary case the court, in dealing with the contention of counsel for the accused that the verdict was against the law and the evidence, says (105 Cal., 495):

"We do not understand counsel as attacking, under this head, the sufficiency of the evidence to justify the jury in finding the defendant guilty of murder, but the contention seems to be that the facts of the case were not such as to warrant the infliction of the death penalty. We confess to some cloudiness of apprehension of this point, and are at a loss to understand exactly upon what ground counsel expects us to review the action of the jury in this respect. The law submits to the jury, under the instruction of the court, the question as to the degree of murder, if any, of which the defendant is guilty in any instance, and section 190 of the Penal Code further provides that one found guilty of murder in the first degree 'shall suffer death or confine-

ment in the State prison for life, *at the discretion of the jury.*"

"Whatever may have been the actuating consideration in the minds of the legislature in enacting section 190, whether because they believed there are instances of murder falling within the definition of murder of the first degree, which, because characterized by a less degree of atrocity or other mitigating circumstance, call for a milder punishment than that of death, or whether their reason was something else, the fact remains that they have confided the power to affix the punishment within these two alternatives to the absolute discretion of the jury, with no power reserved to the court to review their action in that respect."

In the Kamauuu case all that is said on the subject is the following (110 Cal., 613):

"There is no error in refusing to instruct the jury as to how they should use the discretion given them in regard to the punishment in case they found the defendant guilty. This discretion is given to the jury, and the court cannot correct or advise them on the subject further than to inform them of their function."

In this case, as appears, counsel for the accused solicited from the court an instruction to the jury which it was the evident object of counsel should be in such terms as to direct the attention of the jury to supposed circumstances of mitigation or such as might appeal to the sympathies of the jury; the exact opposite of the position of counsel for the appellants in these cases, whose contention is that the court should say nothing further than to inform the jury of the existence of the statute in question. The effect of the decision in the Kamauuu case, therefore, is simply that it is not error for a judge to refuse to do more than to call the attention of the jury to the provisions of the law, leaving it to the jury to render such verdict as, without the aid of the court, it might deem proper.

There is, therefore, evidently nothing in any of the California cases derogating from the authority of People *vs.*

Welch, and the ruling of the court in that case stands as the law under the California statute.

The statute of *Georgia* in relation to cattle-stealing imposes a penalty of confinement in the penitentiary of from two to four years "unless the jury trying the case shall recommend the prisoner to mercy; in that event he shall be punished as prescribed in section 4310 of this code" (Code, sec. 4399).

In Johnson *vs.* State, 58 Georgia, 491 (decided in 1877), the trial court charged the jury as follows (p. 492):

"If you should find him guilty, you may inquire what were the circumstances under which he stole this colored man's cow, and brought her to town to sell her. Were they such as to justify you in recommending him to the mercy of the court? What mitigating circumstances, if he is guilty, are there to warrant you in recommending him to the mercy of the court? If any, he is entitled to their benefit. If, in your judgment, he stole the cow, and there were any circumstances connected with it such as to warrant you in recommending him to the mercy of the court, why then it would be your duty to do it; but if there be none to justify you in recommending him to the mercy of the court, why then you ought not to do it."

The supreme court of Georgia, dealing with this instruction, said (p. 493):

"Section 4310 prescribes punishment not more severe than the chain-gang, fine of a thousand dollars and imprisonment six months. So that a recommendation to mercy grades this offence as less than felony, keeps the prisoner out of the penitentiary, and is a great right to which the defendant is entitled by law. What is that right? It is a right for the jury to say whether he shall be sent to the penitentiary or not. Under what circumstances? Under all circumstances. The law does not limit it to a case of mitigating circumstances, or any peculiar circumstances whatever. But the mercy of the jury, the neighbors of the man, is free; and freely it may be

bestowed in *any* case. It is lodged, too, by the General Assembly, whether wisely or not we are not called upon to say, *in the jury*, and not in the judge. Ordinarily, punishment, its degree and extent, is vested in the court, the occupant of the circuit bench; but the statute, in these offences, vests it in the jury to the extent of saying that this man shall not go to the penitentiary. Whether they ought or ought not to be merciful, is for them to say, independently of directions from the court as to the circumstances which would justify them in so saying. Inasmuch as the effect of the charge of the court was to restrict a right in the jury which the law did not restrict, and as it might have prevented this jury from saying, by their verdict, that the defendant shall not be sent to the penitentiary, we feel obliged by the law to reverse the judgment, and to grant a new trial."

Another statute of Georgia provides as follows:

"The punishment of persons convicted of murder shall be death, but may be confinement in the penitentiary for life in the following cases; if the jury trying the case shall so recommend. If the conviction is founded solely on circumstantial testimony the presiding judge may sentence to confinement in the penitentiary for life; in the former case it is not discretionary with the judge; in the latter it is."

Of this the supreme court of Georgia, in the case of Hill *vs.* State, 72 Ga., 151 (decided in 1883), says (pp. 132, 133):

"This statute leaves it in the discretion of the jury as to whether they will recommend imprisonment for life in the penitentiary of a person convicted of murder; it is not limited or circumscribed in any respect whatever. This law does not prescribe any rule by which the jury may or ought to exercise this great discretion; it does not say that the jury are not to be governed by their sympathies, and that they are to be governed by their judgment, as instructed by the court below. The court below imposed, by its charge, restrictions upon the jury unauthorized and unwarranted by the statute."

In Inman *vs.* State, 72 Ga., 269 (decided in 1884), the same court says (pp. 279, 280):

"The eighth assignment of error complains that the court restricted the jury in the exercise of their right to recommend the defendant to be imprisoned in the penitentiary for life. The errors complained of are: 'If you find him guilty, and the case be one you think you are justified in doing so—the facts and circumstances justify you in doing so—you can say in your verdict "We recommend he be imprisoned in the penitentiary for life."'

"We do not think that the language used by the court was calculated to deprive, circumscribe or restrict the jury in the exercise of their rights to recommend that the accused be imprisoned for life in the penitentiary; in this respect it differs from Hill *vs.* State, decided at the last term of the court. Yet, we think in cases like this, the better practice would be for the court to call the attention of the jury to the law, and merely state to them, if they thought proper they might, in addition to the verdict of guilty, recommend that the defendant be imprisoned in the penitentiary for life. This was substantially done by the court in this case."

In Marshall *vs.* State, 74 Ga., 26 (decided in 1884), the court, considering the charge of the trial court, said that the trial court in effect told the jury that the recommending imprisonment in the penitentiary for life was a matter entirely with the jury, upon which the court gave them no instruction, as he had no right to do so, and that it was a matter of which the jury had absolute control; and such charge the court held to be in exact accordance with the ruling in Hill *vs.* State (p. 32).

In Valentine *vs.* State, 77 Ga., 470 (decided in 1886), one of the assignments of error was (p. 481):

"After the jury had been out in their room several hours without being able to agree, they were brought into court, and the court, on being informed that they had not agreed and wished to be further instructed, asked them what the difficulty was. One of the jurors replied that it was the question of recommendation, and that the jury desired to

know whether, in the event they, the jury, failed to recommend to mercy, the judge had any discretion himself in fixing the punishment. To which inquiry the judge replied as follows: 'That question is entirely with you, gentlemen of the jury. If you find the defendant guilty, the law leaves no alternative to the court but to sentence him to death. It is for you to say from the evidence, from all the facts and circumstances of the case, whether, in the event you find him guilty, you are warranted in recommending him to imprisonment in the penitentiary for life; and if you render a verdict with that recommendation, the court is bound to sentence him accordingly.' The error complained of being, in the opinion of the defendant, that the language used in the supplementary charge again limited the jury in their right to recommend by the facts and circumstances of this case, and that there was a repetition of the error assigned in the fifth and foregoing assignments of error."

In dealing with this assignment of error the court said (p. 482):

"We think that the error herein assigned on these two grounds of the motion amounts to nothing, because the issue of law made is settled by the case of Inman *vs.* The State, 72 Ga., 269. That case covers this. The distinction taken there between that case and Hill *vs.* The State, 72 Ga., 131, also exists here. The case of Johnson *vs.* The State, 58 Ga., 491, relied on so strongly by the able counsel for plaintiff in error, is for the offense of cattle-stealing, and arose under a different statute in respect of the power of the jury on the subject of punishment. Moreover the charge in that case confined the right of the jury in this, that the court charged that if there were no circumstances to justify you in recommending him to the mercy of the court, 'why then you ought not to do it.' Such a charge as that would be error under the statute in respect to punishment for murder, because it said to the jury that they ought not to recommend to mercy unless such and such was proved."

In Thomas *vs.* State, 89 Ga., 479 (decided in 1892), the following is stated in the syllabus:

"The evidence warranted the verdict and the verdict was not rendered illegal by the failure of the jury to recommend

imprisonment for life as the punishment, such recommendation being in all cases matter of discretion with the jury."

The report of the case stops with the statement of the case and of the names of counsel for the parties. There is no opinion of the court in the report and nothing in the statement of the case to show how the question indicated in the syllabus arose.

In the case of Cyrus *vs.* State, 29 S. E. Rep., 917 (decided in 1897), the court said (head-note 2, by the court):

"Following the cases of Inman *vs.* State, 72 Ga., 269, and Valentine *vs.* State, 77 Ga., 470, this court cannot hold it to be cause for a new trial in a murder case that the judge, after charging: 'The punishment for persons convicted of murder shall be death, but shall be confinement in the penitentiary for life if the jury trying the case shall so recommend. If you find the defendant guilty, it is in your discretion whether you will recommend that he be imprisoned for life. You are not limited or circumscribed, and the law provides no rule for guidance'—added: 'If you think this is a case in which you would be justified in recommending a life imprisonment in the event of your finding the defendant guilty, you have a right to make such recommendation, as it is for you to say, in the event of your finding the defendant guilty, whether the facts and circumstances in this case warrant you in making such recommendation. It is all a question for you, under the law and the evidence.' (*a*) As an open question, however, some of the language above quoted would be subject to serious criticism. It would in such cases be decidedly better to omit the use of the word 'justified,' and of the word 'warrant,' and to substitute in their stead language leaving the jury free to dispose of the question of recommending or not recommending life imprisonment, without any intimation from the bench as to what should control or influence them in reaching a conclusion upon this matter."

In *Illinois*, the statute relating to murder provides as follows:

"Whoever is guilty of murder shall suffer punishment of death or imprisonment in the penitentiary for his natural

life or for a term not less than fourteen years. If the accused is found guilty by a jury, they shall fix the punishment by their verdict."

Section 190 Cr. Code.

Under this statute, the supreme court of Illinois in Fletcher *vs.* People, 117 Ill., 184 (decided in 1886), held that evidence is admissible to enable the jury properly to fix the degree of punishment, and that in such case the defendant has the right to give evidence which tends to show that his conduct was less culpable than shown by the prosecution.

And in Nowacryk *vs.* People, 139 Illinois, 336 (decided in 1891), the court, after pointing out that evidence such as that spoken of in the earlier case would be immaterial in the absence of the statute, and could not even have a tendency to reduce the grade of offense from murder to manslaughter, said (p. 342):

"While the statute recognizes no degrees in the crime of murder, yet by providing for so wide a scale of punishment it clearly recognizes the fact that the crime may be committed under circumstances manifesting different degrees of turpitude. The evident design of the statute is that the punishment shall be proportioned to the turpitude of the offense, and it follows that evidence having direct and legitimate bearing upon that question should be given to the jury so as to enable them to fix the punishment understandingly and justly. * * * We are of opinion that the evidence offered in this case had a legitimate bearing upon the question of the degree of turpitude of the offense of which the defendant stands convicted and that he was entitled to have it submitted to and considered by the jury."

In *Louisiana* the statute is very similar to the act under consideration. It is set out in the opinion of the court in the case of State *vs.* Melvin, 11 La. An., 535 (decided in

1856). In that case the court in its opinion says (pp. 536, 537):

"We find error, which may have prejudiced the prisoner, in that portion of the judge's charge to the jury, which is embodied in the following bill of exceptions: 'Be it remembered that on the trial of this cause, the judge, in his charge to the jury, and at the beginning and in the course of his said charge stated to the jury that cases of murder were fearfully numerous in this city; that a conviction on a charge of murder had ceased to be a cause of excitement, and had become a common affair of almost daily occurrence; that confinement in the State penitentiary for life was no adequate punishment for the crime of murder, and that juries had no right to qualify their verdict unless there were mitigating circumstances; that convicts, in the penitentiary, seldom served out their term when confined there for life; that a late governor of this State had pardoned almost everybody, and that convicts were always in the hope that, after a few years, they would appeal to a clement executive, and that none but capital punishment would put a stop to the practice now common of man and woman killing; that he, the judge, on a late visit to the penitentiary had been told, by parties sentenced by him, inmates of the State prison now, that they hoped in a short time to come out; to which charge the counsel for the defendant objected, &c.'

"It is obvious that the charge as above detailed embraced several matters of fact within the personal knowledge of the judge, which would not have been admissible in evidence, had they been offered on the trial, which did not contribute in any way to the elucidation of the law applicable to the case, and which yet had a tendency to influence the finding of the jury by motives extraneous to the cause before them.

"If there could be a doubt under the English common law, with regard to the propriety of such a charge in a criminal case, the legislative enactments of Louisiana would compel us, however reluctantly, to say that it was erroneous. The act of April 30, 1853 (Sess. Acts, p. 249), declares 'that in his charge in criminal cases, the judge must limit himself to giving the jury a knowledge of the law applicable to the cause submitted to them.' And the act of May 29, 1846 (Sess. Acts, p. 118), had previously declared 'that in all cases where the punishment denounced by law is death,

it shall be lawful for the jury to qualify their verdict by adding thereto 'without capital punishment,' and that whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall only be sentenced to hard labor for life, in the State penitentiary.'

"Under these statutes, the judge should carefully avoid giving the jury any indication of his own opinion, touching the facts of the case, or the guilt or innocence of the prisoner.

"And the qualification of the verdict should be left where the law has left it, to the sound discretion of the jury, upon the facts of the case, guided by a sense of their solemn responsibility, which is to do their whole duty to the State as well as to the accused."

It is to be observed that, as will be more particularly dwelt upon hereafter, the judgment of the court in reversing the trial court turned as well upon a statute requiring the judge to limit himself in his charge to giving the jury a knowledge of the law applicable to the case as upon the statute allowing the jury to qualify its verdict. Indeed, it is not going too far to say that the decision of reversal depends rather upon the former statute than upon the latter.

In the earlier case of State *vs.* Shields, 11th La. Ann., 395 (also decided in 1856), the trial judge remarked to the jury:

"Murder is of very frequent occurrence in this community, and when a jury has a case of murder which is clearly made out, the court believes it necessary for a jury to bring in an unqualified verdict in order to deter others from crime."

On appeal the supreme court of Louisiana said:

"Such a charge was calculated to impress upon the minds of the jurors that in all cases of murder they were not at liberty, or, at least, could not with propriety exercise that discretion which is expressly conferred by the statute of 1846, which declares that in *all cases* where the punishment demanded by law is death, it shall be lawful for the jury to qualify their verdict by adding thereto, 'without capital

punishment.' We think the discretion of the jury should not have been trammelled by instructions which were not only calculated to secure an unqualified verdict, but might have been construed by the jury into an intimation of the opinion of the court as to the guilt or innocence of the prisoner."

And in the course of its opinion the court referred to the previous case of State *vs.* Obregon, in which the prisoner was accused of arson. In that case the trial judge instructed the jury "that it was their duty to find an unqualified verdict if the case was clear." Of this the court, in the Shield's case, says:

"This charge was held to be erroneous, as being 'tantamount to an instruction that if a person was found guilty of arson he should always be punished with death, for, unless the case was clear beyond all reasonable doubt, they could not find the prisoner guilty at all.'"

In State *vs.* Rohfrischt, 12 La. An., 382 (decided in 1857), the defendants were indicted for arson and the verdict was "guilty without capital punishment." A motion was made in arrest of judgment, of which the court (p. 383) says:

"Defendants move to arrest the judgment upon the ground that the verdict of 'guilty without capital punishment' is equivalent to a verdict of not guilty of the offense charged in the indictment, because the statute for such case made and provided declares that any person convicted of such offense shall suffer death.

"The law is as stated, but the verdict is justified by the 25th section of the act of 1855 relative to criminal proceedings."

This case is instructive as showing that, notwithstanding its opinion in the earlier case, the supreme court of Louisiana still regarded the penalty unchanged by the privilege allowed the jury of adding the qualifying words to its verdict, which is exactly what the trial judge held at the trial of the cases at bar.

In *Mississippi* the act of March 4, 1875 (Acts 1875, p. 79), empowers the jury to declare in its verdict convicting any person of a capital crime that the punishment shall be imprisonment for life.

In Walton *vs.* State, 57 Miss., 533 (decided in 1879), the accused asked the trial court to charge the jury as follows:

"If after considering all the evidence, the jury find the defendant guilty as charged, beyond all reasonable doubt, they may in their discretion declare in their verdict that the penalty or punishment shall be imprisonment for life in the penitentiary. But if the jury should omit to so declare the penalty in their verdict the court shall pronounce the death penalty."

The trial court refused so to charge the jury, and at the request of the State charged as follows:

"If the jury from the evidence should find the defendant guilty and such should be their verdict, then they may, if they think proper, declare the penalty to be imprisonment for life in the penitentiary. But if they while agreeing in and agreeing to a verdict of guilty cannot agree as to adjudging the penalty to be imprisonment for life, then they shall return a verdict of guilty as charged in the indictment."

The jury found the defendant guilty as indicted. On appeal, a majority of the court set aside the verdict because of the failure of the trial court to inform the jury that if it did not declare that the punishment should be imprisonment for life the sentence would be that of death: upon the ground, as stated by the court, that it was possible that the jury did not know such to be the law.

In Spain *vs.* State, 59 Miss., 19 (decided in 1881), the second instruction given at the instance of the State was that if the jury should simply find the accused guilty as charged in the indictment, it would be the duty of the court to pronounce the death penalty, but that, if the evidence in the case warranted them in so doing, they might find him

guilty as indicted "and declare that the punishment to be inflicted shall be imprisonment in the penitentiary for life," or they might find the defendant not guilty (p. 20). Because of this instruction the Supreme Court reversed the court below, saying of the instruction (p. 24):

"It limits and qualifies the right of the jury to fix the punishment at imprisonment for life, whereas the law confers on the jury this right without qualification or restriction. The right of the jury to fix the punishment as indicated is without any condition. The most atrocious crime committed under the most aggravating circumstances may be punished by imprisonment for life, instead of by death, if the jury so determines by its verdict. The law demands a jury willing to be the instrument of visiting the penalty of death, and confers on such a jury the unconditional right to fix the punishment at imprisonment for life. It was erroneous to instruct the jury that its right was dependent on any state of the evidence or on any view it might take of it. The jury found the prisoner guilty, and he was sentenced to death. The record shows that the jury recommended the prisoner to the mercy of the court, in connection with the announcement of a verdict of guilty, and that the court on that announcement directed the jury to retire and bring in a verdict in accordance with the second instruction for the State. It seems highly probable that, but for this instruction, which made the right of the jury to fix the punishment to depend on its view that the evidence warranted it, the jury would have exercised its right to fix the punishment at imprisonment for life. But, independently of this, the error in the instruction requires a reversal of the judgment."

In *Texas*, the statute reads:

"The punishment for murder in the first degree shall be death or confinement in the penitentiary for life."

Revised Penal Code, art. 609.

In Doran *vs.* State, 7 Texas App., 385 (decided in 1879), the trial court instructed the jury as follows (p. 387):

"If you believe from the evidence that the defendant cut with a knife and killed William Fitzsimons, as charged

in the indictment, and that this was done with express malice and the evidence fails to show any circumstance of mitigation, excuse, or justification, you will then find him guilty of murder in the first degree, and will so say in your verdict, and you need not add more; in which case the law fixes the punishment of death. Or you may, in your discretion, fix his punishment at confinement in the penitentiary for life."

The court held this error, saying (p. 386):

"The provisions of our present code regulating the penalties for murder in the first degree are not similar in phraseology or effect to the laws in that respect in force in this State pending the existence and operation of the constitution of 1869. Under the latter, the penalty for murder in the first degree was fixed at death, but juries were authorized in their discretion to substitute imprisonment for life for the death penalty, in any case they might deem a proper one for the exercise of this discretion (Hunt *vs.* The State, *ante*, p. 212; Marshall *vs.* The State, 33 Texas, 664). It was proper to instruct the jury, in all prosecutions for murder while the constitution of 1869 was in force, that they might find the defendant guilty of murder in the first degree, and, if they did not desire to exercise their discretion as to the commutation, their verdict need only find the fact of guilt, the law fixing the penalty absolutely for that offense.

"By the changes in the law which took effect July 24, 1879, juries were again invested with the discretion as to the infliction of imprisonment for life instead of death; but this mode of punishment was made a distinct legal penalty, along with the other penalty of death; imposing a duty upon a court of stating both penalties to the jury, without any discrimination, express or by implication, as to which penalty was preferable, and leaving the jury to determine that question for themselves."

In Myers *vs.* State, 8 Texas App., 321 (decided in 1880), while the jury was out considering of its verdict, the Revised Penal Code of the State took effect and changed the penalty for murder in the first degree from death alone to death or imprisonment in the penitentiary for life. At the instance

of the prosecution, the court gave to the jury an additional charge, instructing them on this change of the law and directing them to find which penalty the defendant should suffer in case they found him guilty of murder in the first degree. The jury found the defendant guilty and fixed his punishment at imprisonment in the penitentiary for life. This was held error upon the ground that the law in force when the trial commenced was the law in the case until it ended, and the jury had no power to qualify its verdict: the court saying that the question which law was in force was controlled by article 6 of the penal title of the Revised Statutes. This case sheds no light upon the question under consideration, and is used only because it is the only Texas case other than that of Doran in which the statute allowing a qualification of the verdict in a murder case is considered.

In *Utah* there is a statute reading as follows:

"Every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned in the penitentiary at hard labor for life, at the discretion of the court, and every person guilty of murder in the second degree, shall be imprisoned at hard labor in the penitentiary for not less than five nor more than fifteen years."

Penal Laws, Utah, 1876, p. 586.

In the case of Hopt *vs.* Utah, 110 U. S., 574 (decided in 1884), this court had that statute under consideration, and held it error for the trial judge to have characterized the act for which the accused was on trial as "an atrocious and dastardly murder:" for the double reason that section 257 of the Code of Criminal Procedure of Utah forbids the trial judge to "charge the jury in respect of matters of fact," and that the effect of what the judge said was that "the jury might infer, in view of the language of the statute," that the act was murder in the first degree, and "the prisoner had the

right to the judgment of the jury upon the facts, uninfluenced by any direction of the court as to the weight of the evidence" (p. 583).

Again, in Carlton *vs.* Utah, 130 U. S., 83 (decided in 1889), this court had the Utah statute under consideration, and after quoting it uses these words (p. 86):

"It is clear that the authority given in the section last quoted to substitute imprisonment at hard labor in the penitentiary for life for the penalty of death when the accused is found guilty of murder in the first degree depends upon a previous recommendation to that effect by the jury. Without such recommendation, the court in the absence of sufficient grounds for a new trial has no alternative but to sentence the accused to suffer death. * * * The statute evidently proceeds upon the ground that there may be cases of murder in the first degree the punishment for which by imprisonment for life at hard labor will suffice to meet the ends of public justice. This object could only have been met through a recommendation by the jury that a lesser penalty be inflicted, and it is not to be presumed that they were aware of their right to make such recommendation."

And this court accordingly held that the failure of the trial court to instruct the jury upon the point prevented the jury from making a recommendation had it been disposed so to do.

Reviewing the several statutes and decisions above cited, some general observations naturally suggest themselves.

1. The Louisiana, Mississippi, and Utah cases are all affected by the important fact that the trial judge in each instance said something found by the appellate court to have been the equivalent of stating new matter of fact to the jury or of expressing an opinion upon the facts as developed by the testimony; conduct in each of the several jurisdictions concerned directly in conflict with the statute law or settled adjudication.

But the law of the United States is different. In a United

States court, such as the supreme court of the District of Columbia, administering the laws of the United States, the trial judge has the right to express his opinion upon the facts, a question no longer open to discussion. In Simmons *vs.* U. S., 142 U. S., 148, this court, speaking on that subject, says:

"The only exception argued is to the statement made by the judge to the second jury in denying their request to be discharged without having agreed upon a verdict, that he regarded the testimony as convincing, but at the outset of his charge he had told them in so many words that the facts were to be decided by the jury and not by the court, and it is so well settled by a long series of decisions of this court that the judge presiding at a trial, civil or criminal, in any court of the United States is authorized whenever he thinks it will assist the jury in arriving at a just conclusion to express to them his opinion upon the questions of fact which he submits to their determination."

2. There is no Federal decision directly in point. The decisions of this court in the Utah cases are really to the effect only, first, that the trial judge being forbidden by statute to charge the jury on matters of fact, any statement by him as to the effect of the evidence is error, as tending to deprive the jury of its right to fix the degree of guilt; and, secondly, that the failure of the trial judge to inform the jury of the existence of the law giving them the right to recommend the less punishment was error. But there is in the case of Sparf *vs.* U. S. (156 U. S., 51) a very helpful utterance of this court in the direction of illustrating the question under consideration.

In that case, which was on an indictment for murder, one of the main questions was as to the right of the jury to find the accused guilty of a less offense in conformity with the provisions of section 1035 of the Revised Statutes of the United States. That section reads as follows:

"In all criminal cases the defendant may be found guilty of any offense, the commission of which is necessarily

included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged; provided that such attempt be itself a separate offense."

In dealing with that section the court said :

"The court below assumed, and correctly, that section 1035 of the Revised Statutes did not authorize a jury in a criminal case to find the defendant guilty of a less offense than the one charged unless the evidence justified them in so doing. Congress did not intend to invest juries in criminal cases with power arbitrarily to disregard the evidence and the principles of law applicable to the case on trial. The only object of that section was to enable the jury, in case the defendant was not found to be guilty of the particular crime charged, *and if the evidence permitted them to do so*, to find him guilty of a lesser offense, necessarily included in the one charged, or of the offense of attempting to commit the one charged."

This language clearly imports that in a court of the United States no jury will be justified in reaching a whimsical conclusion, or any conclusion inconsistent with the facts as developed by the testimony; which, in essence, is all that the trial judge in the cases at bar told the juries.

3. While the law of many of the States of the Union gives juries the right to fix the penalties for various offenses, as in the case of Illinois, already noticed, the general principle of the law governing a United States court is itself to fix the penalty in every case, leaving the jury only to determine the question of guilt or innocence. The statute under consideration departs from this principle to an extent, and it is a sound rule of construction that when a statute departs from a general principle of the law the courts will hold the departure to the narrowest compass rather

than unduly extend it. By the law of the United States, it is the function of the judge to lay down the law in criminal cases and of the jury to determine facts (Sparf *vs.* U. S., *ubi supra*), and it is the duty of the legislature to prescribe the punishment. The statute under consideration trenches upon the domain of the legislature to an extent, and gives to juries in cases contemplated by the statute a right not before existing and wholly at variance with the general principle underlying the criminal jurisprudence of the United States. Accordingly, the courts should rather restrain than enlarge the operation of this departure; and as it is within the clear province of the judge in a United States court to express his opinion upon the facts, and even, as in the Simmons case, to go the length of holding a jury to the firm discharge of its duty when the court sees that that duty is clear; so, in applying the statute under consideration, it must be the right of the trial judge to hold juries to the conscientious discharge of their duty, and to warn them against the arbitrary or whimsical exercise of a power which, as was pointed out in the cases at bar, might, as matter of fact, be extended to the acquitting of a plainly guilty man. To hold the contrary would seem to be to deprive the trial judge of the high right, belonging to every United States judge, of advising the jury in a criminal case.

4. The construction contended for in behalf of the petitioners in effect also involves the trenching by the jury upon the high prerogative of the executive in respect of pardons. If it be that in every case in which the statute is applicable the jury may of its own whim qualify its verdict, what is this more than to say that the power to commute a sentence of death into one of imprisonment for life is vested for the time being in any particular twelve men of the community who may happen to form the jury in a given

case to which the statute applies? In other words, it is no more than to say that every possible body of twelve persons qualified for jury service in United States courts is vested with the absolute power of commutation of sentence in the cases to which the statute applies. Regard being had to the principles of our system of jurisprudence, which so jealously keeps separate the several departments of government and the respective functions of judge, jury, and legislature, it cannot be that the courts will be astute to extend rather than to restrain so clear a departure from fundamental principles.

Passing from these general observations, and in support of the statement that the charge of the trial judge in the cases at bar was in exactly the spirit of the language of this court in the Sparf case, let us recall what the trial court said. As already pointed out in the Winston case, the court, dealing with the contention of counsel that because the jury had the right to qualify its verdict it was the jury's duty so to do, observed that, in his opinion, the qualifying words should not be added except in cases having palliating circumstances which would seem to justify and require the addition of the qualification. He distinctly told the jury, however, that it was its right and privilege in a proper case to qualify its verdict (*ante*, p. 12).

In the Strather case the trial judge distinctly told the jury that he could not control its action as to adding the qualification, but that the penalty for murder had not been disturbed by the act of Congress under consideration, and the jury should not interfere with it unless the circumstances were such as to satisfy it that the qualification should be added (*ante*, p. 13).

And in the Smith case the trial judge told the jury that the statute authorized the jury, if the evidence justified it

on its conscience in so doing, to qualify its verdict by adding the words "without capital punishment" (*ante*, p. 15).

Plainly the effect of the court's language in each case was that the act in question did not authorize the jury whimsically to abolish capital punishment in any given case, but that the statute did give the jury power to abolish capital punishment in any case in which the facts showed a less degree of willfulness or moral turpitude than in the ordinary case of murder. In principle this is the same thing that this court said in the Sparf case, namely, that in reaching its decision the jury must in every instance be guided by the evidence, and that under the law it has no arbitrary power to do what the evidence does not justify.

In this connection the Illinois cases above cited, and which are cited also by the Court of Appeals of the District in its opinion, are especially in point. In those cases the court held that inasmuch as the statute of the State authorized the jury in a murder case to fix the penalty in case of conviction at any punishment from imprisonment for fourteen years to death, it was proper for the jury to hear testimony, otherwise irrelevant and immaterial and therefore unlawful, which might tend to aid the jury in reaching a decision as to the penalty. This is nothing more than to say in another way that the discretion vested by the statute in the jury is to be exercised upon and guided by the facts and circumstances of the given case, and this in substance and effect is what the trial judge said to the juries in the cases at bar. What he said was, in a word, that the statute under consideration was not intended to vest the jury with the arbitrary, willful, or whimsical power to dispense with the death penalty in a case of murder, but that the object was to give the jury the power or privilege in cases seeming to warrant it so to qualify its verdict as to call for the lighter punishment.

And what is said in the briefs of counsel for the petitioners to the contrary calls for only passing notice. What was said by the trial judges in the Bram and other District court cases is, of course, of no moment in the discussion, as the question really received no consideration in those cases, the court contenting itself with informing the jury of the statute and its power thereunder. And what is said by counsel about the effect of the Louisiana decisions loses its point when it is considered, first, that those decisions in terms rest upon two statutes instead of one (as already pointed out), and, secondly, that in the debate in the House of Representatives while the statute in question was there pending, the author of the statute does not profess to adopt more than the principle of the statutes in force in other States as well as in Louisiana. Were it that at the time of the passage of the act under consideration the supreme court of Louisiana had in terms decided, in a case in which that was the sole or even controlling question, that the discretion of the jury was to be left absolute, there would be undoubted force in the contention of counsel based upon the principle that when one legislature adopts the act of another it adopts it with the construction of the highest court of the State of origin of the act at the time of adoption; but it would be not only unsafe, but also unsound, to say that the adopting State must be bound by a decision in which the adopted legislation is only one of the elements involved in the decision of the court of the State from which the legislation is adopted. As is seen upon a mere reading of the language of the Louisiana court, the trial judge in each case had in terms violated the statute of the State forbidding him to comment upon the facts, and had, indeed, pressed upon the jury by his own testimony facts wholly outside of the case on trial. Had the reviewing court stopped here a reversal would necessarily have followed, and surely the mere fact of coupling with its citation of the statute offended against the

other statute in relation to qualifying verdicts in capital cases cannot be considered as so clear and deliberate a construction of the latter statute as to bind any jurisdiction thereafter adopting the principle of that statute.

Respectfully submitted.

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No. 434.

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OCT 28 1898
JAMES H. MCKENNEY,
Clerk.

Brf. of Wheeler for Petitioner.

United States Supreme Court,

OCTOBER TERM, 1898.

Filed Oct. 28, 1898.

THE ATLAS STEAMSHIP COMPANY (Limited),
Petitioner,

vs.

THE STEAMSHIP "LA BOURGOGNE," her engines, &c.,
LA COMPAGNIE GENERALE TRANSATLANTIQUE,
Respondent.

BRIEF FOR THE PETITIONER.

EVERETT P. WHEELER,
Advocate for Petitioner.

Supreme Court of the United States,

OCTOBER TERM, 1898.

THE ATLAS STEAMSHIP COMPANY (LIMITED),
Petitioner,

versus

THE STEAMSHIP BOURGOGNE, her Engines, Tackle, Apparel and Furniture, etc. The COMPAGNIE GENERALE TRANSATLANTIQUE,
Claimant and Respondent.

Brief for Petitioner and Libellant.

STATEMENT.

This is a motion for a writ of Certiorari to review a decree of the Circuit Court of Appeals in the Second Circuit, which affirmed a decree of the District Court for the Southern District of New York.

The decision of the District Court is reported 76 Fed., 868 ; and of the Circuit Court of Appeals, 78 Fed., 475.

The libel was filed to recover damages for a collision in New York harbor, February 29, 1896, in which the steamship *Ailsa*, then lying in Grave

send Bay, and a little west of south from Fort Lafayette (on the eastern side of the Narrows), was sunk by the steamship *Bourgogne*. The fog at the time was so dense that a vessel could not be seen at a distance exceeding 150 feet.

An inspection of the map facing page 500 of the record "showing anchorage ground in the port of New York," will make the situation clear.

The undisputed facts in the case are set out in the petition. These are in a narrow compass. The length of the record is produced by conflicting testimony as to the place where the *Ailsa* was anchored ; and by cumulative testimony as to the vigilance of the *Bourgogne*.

Eliminating this the case presents only a few important questions of law.

These are succinctly presented by reference to the *Bourgogne's* answer (pp. 8, 9) :

"About thirteen minutes past one o'clock in the afternoon of Saturday, the 29th day of February, 1896, the said steamship *La Bourgogne* left her pier at the foot of Morton street, North river, in the city of New York, with a cargo of merchandise and a number of first, second and third-class passengers, bound on one of her regular voyages to Havre, and that after hauling out into the stream, she turned and straightened on her course down the river towards Sandy Hook. A heavy rain was falling, but the weather was otherwise sufficiently clear to afford a good view of vessels in the harbor and render navigation reasonably safe. The tide was ebb and a brisk wind was blowing from south southwest.*

La Bourgogne's navigation was under the direction of a duly licensed pilot stationed on the bridge with her commander and a full corps of officers, quarter-masters and specially trained seamen. Her second captain with two efficient look-outs were stationed forward at the bows, and a number of able seamen with a competent boat-

* This was in fact south south east (p. 304, fol. 1214 ; p. 306, fol. 1224).

swain were also on duty on the upper forward deck under the orders of the second captain, and all attentive to their respective duties. In these conditions, *La Bourgogne* proceeded down the channel without special incident or event until she passed Bay Ridge and approached the Narrows when the weather thickened, whereupon the engines were slowed and the whistle sounded at the intervals required by the regulations. The steamer thus proceeded until after she had passed Quarantine when she encountered a dense fog which shut out all view of Staten Island and vision ahead through the Narrows. The captain and pilot then concluded that it was unsafe to attempt to proceed to sea and decided to anchor the ship, but as they were in the Channel in the way of passing vessels it was decided necessary to drop down further and anchor in Gravesend Bay below Fort Lafayette. The steamer then proceeded very cautiously through the Narrows, still sounding her whistle as required by law, and at the lowest speed possible to maintain steerage way, until she had the bell of Port Lafayette abaft her port beam. She then stopped her engines and shortly afterwards starboarded her helm to turn out of the Channel, but before any considerable change of heading the man on the lookout descried a vessel which afterwards proved to be the British steamship *Ailsa* lying at anchor in the middle of the channel, and bearing a little on the port hand of *La Bourgogne*, and which had given no warning of her presence by bell or other signal or sound; whereupon the engines of *La Bourgogne* were immediately reversed full speed astern and her helm thrown to port, but notwithstanding these manœuvres the two vessels came together, the stem of *La Bourgogne* striking the *Ailsa* in the port bow and penetrating her hull."

The important issue tendered by this part of the answer is that the "*dense fog which shut out all view of Staten Island and vision ahead through the Narrows*" was not "*encountered*" until after the *Bourgogne* had passed Quarantine (p. 9, fol. 34).

We note:

1. Whether this is an issue at all depends on the meaning to be given to the word "encounter." If this means actually to meet and touch, then the allegation is in the main supported by the evidence. If it read: "The steamer thus proceeded until she was nearly abreast of Quarantine," it would accurately state the facts, for the dense bank of fog did not extend above Quarantine. But if it means to see from the distance of two miles, the allegation is not sustained by any evidence.

There is no pretense that this fog shut in suddenly, or that it could not be seen from abreast of Robbins Reef Light or the red buoy at the tail of the mud flats. This is the bell buoy at the turn of the channel, on the east side, and a little below Robbins Reef Light.

2. The evidence is positive and undisputed that as the *Bourgogne* passed the buoy at the tail of the mud flats, which is over two miles above Quarantine, her captain and pilot, who were on the upper bridge, saw that Staten Island was obscured by a fog which concealed from them entirely the vessels which were lying at anchor off the Staten Island shore (pp. 370, 371, fols. 1480, 1481). They also perceived that the Narrows was full of fog, so that Fort Lafayette was invisible (p. 335, fol. 1340; p. 336, fols. 1341, 1342; p. 410, fol. 1939).

The pilot was asked (p. 371, fol. 1481):

"Did you, at any time after you passed that red buoy at the mud flats on your port side, see Fort Lafayette? A. No, sir.

Q. It was shut in at that time, wasn't it? A. Never seen it at all.

Q. And, of course, you didn't see anything beyond it? A. No, sir.

Again he was asked (pp. 379, 380, fols. 1516, 1517):

"Q. Just as you turned the buoy on the Mud Flats then you saw it was thick down below? A. Yes, sir.

Q. And you decided to anchor? A. In my own mind; I didn't tell anybody.

Q. In your own mind without saying anything to anybody? A. Yes, sir.

Q. You came to the conclusion that you couldn't go to sea? A. Not the way the weather was down below."

Shortly after, and as they approached Quarantine, they lost sight of Fort Hamilton, and the captain then said to the pilot that they ought to anchor (p. 305, fol. 1219); drew a line on the chart submitted herewith (Ex. A) where they entered the dense fog, and he wrote thereon, "ligne á partir de laquelle nous étions dans une brume trés epaisse" (line on leaving which we were in a very thick fog). This was east northeast from the Quarantine landing. The point in mid channel on this line is 3,750 feet from Fort Lafayette. Here is about where the ship was when he advised anchoring.

This was in reference to a then existing contingency. The Staten Island shore and Fort Lafayette were invisible. There was a thick fog in the outer bay; thick enough at that time—as all the witnesses on the *Bourgogne* agree—to conceal Fort Lafayette from them where they were. Indeed, they never were able to see that fort at any time, nor anything below it (p. 314, fol. 1256; p. 334, fol. 1334; p. 335, fol. 1340; p. 363, fol. 1450; p. 371, fol. 1481). It had been more or less thick all the morning. Saturday is a day on which many steamers leave New York. Gravesend Bay is a favorite anchorage in a fog, and the captain and pilot were bound to infer that there were vessels already there. The pilot of the *Ad-*

vance enumerated six steamers anchored off Gravesend Bay, besides his own and the *Ailsa* (pp. 416, 417). Three of them must have gone down before the *Ailsa*.

The *Bourgogne's* pilot ought to have said to himself, "The Narrows are obstructed by a fog. So far as I can see the outer bay is obstructed by fog, the wind is from that direction (S. S. E., p. 304, fol. 1214; p. 306, fol. 1224), and must have brought the fog in, and therefore if there is fog here there must be fog there." He could not have supposed that a curtain of fog hung over Fort Lafayette like the drop in a theatre. Captain Heath, of the *Galileo*, was wiser, and anchored off Stapleton (p. 101, fol. 401); so did other steamers (p. 361, fol. 1444).

The thickness of the fog between half-past one and two is thus stated by an impartial witness, Capt. Cooley of the tug *Harold* (p. 83, fol. 331):

"So thick you couldn't see over 100 feet, if you could see that."

Jaycox, engineer of the same tug, says (p. 95, fol. 378):

"It was so thick you couldn't see where you were going."

POINTS.

First.

On motions for a writ of *certiorari* this Court does not pass finally on the merits of the questions which were disposed of by the Court below. It rather considers whether they are questions of such importance as to require to be fully debated in this

Court, and whether there is sufficient doubt respecting the correctness of the disposition made of them in the Court below, to warrant further and more deliberate consideration.

On the first proposition we submit:

1. The question of navigation involved in the case is not distinctly disposed of by the statutory rules of navigation.

2. It is a question which arises in each of the great harbors on the Atlantic coast several times during the year.

3. It is a question, the determination of which involves the safety of many human lives and the security of large amounts of property. It is true that in the case at bar the steamship sunk was not one of the largest steamships, but she might readily have been. Many large steamships, the *Campania*, of the Cunard Line, the *Werra*, of the North German Lloyd, and other somewhat smaller vessels were lying near the *Ailsa*, and might have been struck by the *Bourgogne* had the *Ailsa* not first received the blow.

Again, it is true that no lives were lost. But the facts disclosed in the record show that this was probably owing to a circumstance which could not reasonably have been expected, that the tug *Harold* was cruising about the harbor in the fog, picking her way by the bells of the bell buoys, and by the bells from ships at anchor (pp. 84, 85, fol 333-337), and that she came upon the *Ailsa* just about the time she was struck, and thus saved the lives of all on board. Possibly, they might have been saved in the *Ailsa's* boats. But the recent sad experience of the very steamer that ran the *Ailsa* down, shows that in emergency and alarm, a steamer's boats are not always sufficient for the safety of the passen-

gers. The path of wisdom is to guard as far as possible against danger of collision.

4. The decision of the Court below in this case does not carry out to their logical consequences the decisions previously made by this Court in reference to collisions in fogs. It is possible that no exact precedent can be found for the precise circumstances of this particular case. But well settled rules respecting the management of steamers with reference to thick fog logically impose the requirement, that ocean steamers manœuvering in crowded harbors and seeing dense fog banks immediately before them, impenetrable to vision, and uncertain of penetration by sound, should anchor before entering into the darkness where safety at most is a matter of good fortune, and not of good management.

5. One other question, perhaps even more important, is involved in the case. The Circuit Court of Appeals and the District Court in effect held that in cases not governed by the rules of navigation, a lesser degree of diligence is to be required of navigators than in cases covered by the rules, and they do hold distinctly that the fact that "the pilots of at least four other steamers came to the same decision and acted accordingly" is controlling upon the question of negligence on the part of the navigators of the *Bourgogne*. We shall endeavor to show that the rule of diligence is entirely irrespective of the question whether or not the particular course of conduct is pointed out by the rules, and that the measure of diligence varies according to the risk, and is not controlled by the consideration whether or not there is a specific statutory requirement. We shall also endeavor to show that on the question of what constitutes reasonable care under the circumstances, the practice of other mariners is not at all controlling. In a word the question is

not what others have done, but what under the circumstances they ought to have done. The consideration of all these questions is greatly simplified by the circumstance, unusual in collision cases, that upon the points which are to be discussed in this brief, there is no conflict of testimony.

The points which have thus been stated and which are necessarily involved in the case, would seem to be quite as important as those which were involved in the *Umbria*, 166 U. S., 404, in which this Court granted a *certiorari* to the Circuit Court of Appeals for the Second Circuit.

In the consideration of these questions attention will only incidentally be called to the position of the *Ailsa*. For if we assume for the sake of the argument that the *Ailsa* was anchored outside the invisible line of anchorage fixed by the Secretary of the Treasury, and that her being anchored there was contributory negligence which should charge her with fault, we shall endeavor to show that even on this assumption the damages should be equally divided, and that the ruling of the Court below in this respect, at least, was erroneous.

If the writ of *certiorari* should be granted, the whole merits of the case would then be open for discussion, but for the purposes of the present motion it would seem sufficient to show that the *Bourgogne* at least was equally in fault.

Second.

Bourgogne at fault for not anchoring above the Narrows.

The rule as to vessels at anchor is thus stated by Judge LOWELL in the *Lady Franklin* (2 Lowell's Rep., 220).

"That a vessel which is in motion is bound to avoid one lying at anchor, is a rule so plainly founded in reason that there can never be a difference of opinion about it."

S. P. The Rockaway, 19 Fed. Rep., 449; affirmed by Judge WALLACE, 25 Fed. Rep., 775.

The *Louisiana*, 3 Wall, 164.

The *Granite State*, 3 Wall., 111.

The rule is the same in the English Courts.

The *Blue Bell*, Probate Division (1895), p. 242.

This was the case of a steamer going down the Thames and running into a dense fog; she stopped her engines and went down with the tide at the rate of two knots.

Mr. Justice BRUCE said (Mr. Justice JEUNE concurring):

"In a dense fog it is the duty of a steam vessel to anchor as soon as circumstances will permit. The neglect of the duty to anchor in a thick fog is a frequent cause of damage to property and loss of life, and we conceive it to be highly important in the interests of navigation that those who disregard the duty should bear the loss occasioned by their imprudence."

S. P. The Otter, Law Rep. 4 Adm. and Ecc., 203.

The burden of proof is on the vessel in motion, to show that the collision occurred without fault on her part.

The Meanatchy, L. R., 1897, Appeal Ca., 351.

The Annot Lyle, 11 Prob. Div., 114.

The Indus, 12 Prob. Div., 46.

The Bothnia, Lush., 52.

The Baltic, 2 Bened., 452.

In the *Batavier*, 2 William Robinson, 407., affd. 9 Moo. P. C., 286, Dr. LUSHINGTON said:

"That the vessel under way is bound to show, by clear and indisputable evidence, that the accident did not arise from any fault or negligence on her part, and for this obvious reason, that a vessel lying at anchor has no means of shifting her position or escaping the collision. It is, I apprehend, the bounden duty of the vessel under way, whether the vessel at anchor be properly or improperly anchored, to avoid, if it be possible with safety to herself, any collision whatever."

This proposition is admitted by the Circuit Court of Appeals. At pp. 504-505 of the Record the Court says:

"Inasmuch as the moving steamship had collided with a vessel at anchor, and therefore powerless to help herself, it was incumbent upon the ship in motion to take the burden of freeing herself from this charge of negligence, for the presumptions were *prima facie* against her; and, if the vessel was anchored in an improper place, the colliding vessel should show that she could not be avoided by the use of due care."

This latter admission leads logically to a conclusion the soundness of which the Court deny, to wit, that it was the duty of the *Bourgogne* to anchor above the Narrows. In the failure to recognize the necessary connection between the two propositions lies the inherent fallacy of their opinion:

1. If it was the duty of the *Bourgogne* to take precautions to avoid the *Ailsa*, even if the latter was in a wrong place, it was her duty to take these precautions in season.

"Precautions not seasonable are of little or no value, nor do such efforts constitute a compliance with the usages of the sea or statutory rules of navigation. Such precautions must be seasonable

in order to be effectual; and if they are not so, and a collision ensues in consequence of the delay, it is no defense to say that nothing more could be done to avoid the collision, nor that the necessity for precautionary measures was not perceived until it was too late to render them availing."

The *Sunnyside*, 91 U. S., 208.

It is obvious that in a fog so dense that you cannot see over 150 feet, and in a tideway where the tide runs from two to three knots, no precautions either of signal or lookout can be of any value so far as a vessel at anchor is concerned. Signals would be useless, for the vessel at anchor could not avoid the oncoming vessel. The lookout could not see far enough to enable the moving vessel to stop in time to avoid a collision.

The rule on this subject is well established:

In the *Nacoochee*, 137 U. S., 330, 339, the Court cite with approval the *Batavier*, 9 Moore, P. C., 286, as follows:

"The rule laid down in the last-named case is that, at whatever rate a steamer was going, if she was going at such a rate as made it dangerous to any craft which she ought to have seen, and might have seen, she had no right to go at that rate."

In the *Umbria*, 166 U. S., 404, 417, this Court say:

"It was said in the early case of The *Batavier*, 9 Moore, P. C., 286, that 'at whatever rate she was going, if going at such a rate as made it dangerous to any craft which she ought to have seen, and might have seen, she had no right to go at that rate.' This language was quoted with approval in the *Colorado* vs. The *H. P. Bridge*, 91 U. S., 692, 703.

"So, too, in the case of The Great Eastern, Brown & L Adm., 287, it was said that 'their lordships are of opinion that it is the duty of the steamer to proceed only at such a rate of speed as will en-

able her, after discovering a vessel meeting her, to stop and reverse her engines in sufficient time to prevent any collision from taking place."

S. P.—The *Grenadier* vs. the *August Korff*, 74 Fed. Rep., 974.

The *Pennsylvania*, 4 Bened., 257; affirmed on this point, 19 Wall., 125.

At p. 134, this Court say:

"Even if it were true that such a rate was necessary for safe steerage, it would not justify driving a steamer through so dense a fog, along a route so much frequented, and when the probability of encountering other vessels was so great. It would rather have been their duty to lay to."

Marsden on Collisions (3 Ed), 402, thus states the rule:

"In a fog so dense that it is not possible for a ship to see others in time to avoid them, she is not justified in being under way at all except from necessity."

Ibid., p, 404.

"Nor is she justified in the Thames in leaving a wharf in a dense fog for the purpose of going up the river on a flood tide."

I bid, 515.

"If the weather is such that an object cannot be seen in time to avoid it, a vessel has no right to be under way at all. In such weather she should bring up on the first opportunity, and not get under way unless obliged to do so."

S. P. The *Raleigh*. 41 Fed. Rep., 527.
The *H. F. Dimock*, 77 Fed. Rep., 226,
23 C. C. A., 123.

The *John Adams*, 1 Cliff., 404. At page 414, the Court say:

"When those in charge of them have lost the

bearings of the vessel and do not know that the way is clear, they should stop, and if necessary come to anchor; and if contrary to these suggestions, they rashly advance, the owners must take the consequences."

2. But it is said there is no statutory rule requiring a steamer always to stop before she runs into a dense fog. True. Nor could such a general rule be wisely established. But it by no means follows that under the circumstances of this case the duty of stopping before reaching the fog did not devolve upon the *Bourgogne*. The Circuit Court of Appeals on this point say (86 Fed. Rep., 480):

"Her act was not in violation of a statutory rule. Therefore, its negligence or its accord with prudence must be judged of by the aid of the considerations which naturally designate conduct in this respect."

The Court then proceeds to hold that inasmuch as four other steamers that day ran through the Narrows and anchored in Gravesend Bay, this was a prudent thing to do.

In this conclusion lies the second fallacy of the opinion.

The frequency of a transgression may diminish moral blame, but not legal liability. This is the ancient defense for steamers running too fast in a fog. All the great liners do this, and generally escape accident. But all the authorities agree that they do it at their own peril, and if collision does happen the vessel in fault is charged, notwithstanding the fact that she is only one of many offenders.

The *Martello*, 153 U. S., 64, 71.

The ordinary care required by law is not the care that the ordinary man has taken, but the care the Judges think he ought to take under the circumstances of the case.

In Thorp *vs.* Hammond, 12 Wall., 408, two schooners were near the *Huntley* and were likely to beat out their tacks and come about. This Court held that these circumstances imposed on *Huntley* the duty of special vigilance. Evidence was given that it was customary not to have a lookout in the day time, and while reefing. The Court held that such custom "would not be a reasonable one, nor sufficient to justify the absence of a lookout." The same rule has been applied in a variety of cases.

Wabash R. R. *vs.* McDaniels, 107 U. S., 454.

The claim was that the diligence used in the employment and retention of the telegraph operator employed by the company was that which was customary among railway managers. This Court say (p. 461):

"To this view we cannot assent. * * * A degree of care ordinarily exercised in such matters may not be due or reasonable or proper care, and therefore not ordinary care within the meaning of the law."

To the same effect are

Grand Trunk R. R. *vs.* Richardson, 91 U. S., 454, 469.
Maynard *vs.* Buck, 100 Mass., 40.
Chicago &c. R. R. Co. *vs.* Clark, 108 Ill., 113.

It appears from the report of the *Sunnyside* in the Circuit Court, 1 Brown, Adm., 227, 238, that the tug was lying for a tow "in conformity with a well-known usage." Yet this Court reversed the Circuit Court on this point (affirming, however the District Court) and held the tug in fault.

The *Sunnyside*, 91 U.S., 208, 212.

3. In this connection the attention of the Court is called to Rule 20 of the Sailing Rules of 1864, which is the same as Article 24 of the Sailing Rules of 1885 (23 Rev. Stat., 442), and Article 29 of the Rules of 1890. This rule is as follows:

"ART. 24. Nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen or *by the special circumstances of the case.*

This Court held that although this original rule of 1864 was not re-enacted by the Revised Statutes it remained in force, even before it was re-enacted in 1885.

The *Elizabeth Jones*, 112 U. S., 514.

The probable reason why it was not re-enacted by the Revised Statutes was that it was thought to be unnecessary, but for greater caution it now finds a place in the official code. It recognizes the great cardinal principle in all cases of negligence, that the degree of care should be proportioned to the risk. This rule finds illustration in many reported cases.

The *Ariadne*, 13 Wall., 475.

At page 478 this Court say:

"The waters near the city of New York are at all times crowded with shipping. Navigation there is not unlike the traveler threading his way through the mazes of a forest, with the difference that most of the objects to be avoided are also in motion. The greatest care and caution are necessary. The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. A moment's negligence on his part may involve the loss of his vessel with all the property and the lives of all on board. The

same consequence may ensue to the vessel with which his shall collide. In the performance of this duty the law requires indefatigable care and sleepless vigilance. The rigor of the requirement rises according to the power and speed of the vessel in question. It is applied with full force to the steamships belonging to our commercial marine. If this were not so, there would be no safety for other vessels. But it is equally important to vessels of that powerful class for their protection from one another. It is the duty of all Courts charged with the administration of this branch of our jurisprudence to give it the fullest effect whenever the circumstances are such as to call for its application."

Especial attention is called to this case because the Court did what it is asked to do in the case at bar, gave to the rule referred to, "the fullest effect," and reversed the decisions of the Courts below which had not done so. This decision in the *Ariadne* was cited with approval in

The Oregon, 158 U. S., 186, 193.

In the *Mellona*, 3 W. Robinson, 7, 13, Doctor Lushington thus states the rule:

"It is no excuse to urge that from the intensity of the darkness, no vigilance, however great could have enabled the *Mellona* to have descried the *George* in time to avoid the collision. In proportion to the greatness of the necessity, the greater ought to have been the care and vigilance employed."

4. It was argued strenuously below that no cases had ever held that there was any duty upon a vessel not to enter a fog. We do not contend that on an ocean voyage a steamer is ordinarily bound to stop when a fog bank is seen ahead. It has been held that under such circumstances she is bound to reduce her speed before she enters the fog, so that when she gets into it she shall not be going at a rate of speed which the Court would hold to

be excessive. To use the language of Judge BROWN in the

City of Alexandria, 31 Fed. Rep., 427, 431.

"The steamer running into a fog bank was bound at her own risk to moderate speed as soon as she got into a fog and to regulate her approach to a fog bank accordingly."

S. P. The *Trave*, 55 Fed. Rep., 117.

We submit that the principle of these cases is applicable to the case at bar. We have here a vessel leaving her pier under circumstances which soon disclose to her that it is impossible for her to go to sea. A fog bank is seen ahead of her so dense as to entirely conceal the shore and fort. Under these circumstances the same reason that requires speed to be slackened before entering a fog bank at sea, requires the vessel, knowing that she cannot go through the fog bank, to avoid entering it, and come to an anchorage in a place known to be one of safety.

5. It is argued that the pilot could not tell but that when he should reach "Fort Lafayette, he would still be able to see two miles ahead." This does not state the testimony correctly. As already shown, and as alleged in the answer already quoted there was no fog in the upper harbor. It is not the case of a vessel in a light fog, allowing objects to be descried at a distance of two miles, but of a vessel in a rain, seeing a dense fog bank two miles off, and knowing that at the moment she can anchor in safety, but also that in the fog she cannot move without danger.

Moreover the proof from the pilot of the *Advance* who followed the *Bourgogne* closely, is that the rain was drenching (p. 422, fol. 1687) and the

weather even in the upper bay so thick that a steamer could not be seen at a distance of a quarter of a mile (p. 424, fol. 1694, 1695).

Third.

Position of the Ailsa no Excuse to the Bourgogne.

It was argued strenuously in the Court below that if the *Ailsa* anchored outside the anchorage line, this fault on her part would deprive her of all remedy.

I.—Assuming, for argument sake, that this was a fault, as the Courts below held, the damages should still be divided.

In the *Maria Martin*, 12 Wall., 31, this Court say (p. 47):

"Errors committed by one of two vessels approaching each other from opposite directions do not excuse the other from adopting every precaution required by the special circumstances of the case to prevent a collision."

The authorities cited for the claimant all recognize this proposition.

In Strout *vs.* Foster, 1 Howard, 89, the report, as well as that in 17 Peters, 107, shows that this Court was equally divided. Mr. Justice McKinley's opinion in the Circuit Court, which is quoted in Howard's report, reversed the judgment of the District Court. The case can hardly, therefore, be considered as authority. But one of the propositions in Justice McKinley's opinion is quoted in later cases, especially

The *Clarita* and the *Clara*, 23 Wall., 1, 14.

This Court there add:

"But whether she be in a proper place or not, and whether properly or improperly anchored, the other vessel must avoid her, if it be reasonably practicable and consistent with her own safety."

The other cases cited by the respondent do not contest this proposition, and Justice McKinley himself admitted in the opinion referred to that if both were at fault the damages must be divided.

In the *Bedford*, 5 Blatchf., 200, Mr. Justice Nelson held both vessels at fault, the schooner for anchoring in or near the track of ferryboats in violation of city ordinance, and the ferryboat for not using greater precautions to avoid the schooner.

In the *Scioto*, 2 Ware, 360, 368, Judge WARE says:

"Admitting that she was anchored in an improper place, her fault would not excuse any want of care and caution in another vessel."

In the *Marcia Tribou*, 2 Sprague, 17, Judge Sprague held both vessels at fault, the sloop for anchoring outside the Harbor Master's lines and the schooner for having no lookout.

The question could not arise in Lambert *vs.* Staten Island R. R., 70 N. Y., 108. That was an action at common law, and proof that plaintiff was negligent defeated the action.

The English law is the same as ours on this point.

In *Hay vs. LeNeve*, 2 Shaw, Sc. App., 395, the House of Lords held both vessels at fault, one for being anchored in the fairway in the Firth of Forth, and not showing a light, and the other for not having proper lookout.

II.—Under the circumstances of this case the

Ailsa was not at fault for anchoring outside the anchorage line.

The *D. S. Gregory*, 6 Blatchf., 528.

In this case a steamer anchored in the North river in the track of ferryboats. The fog was so thick "it was difficult to see a vessel at a distance "of a ship's length ahead."

Mr. Justice NELSON held that she was not in fault for anchoring there under the circumstances.

S. P. The *Aguadillana*, 6 Asp. M. C. (N. S.), 390.

The *H. F. Dimock*, 77 Fed. Rep. 226; 23 C. C. A., 123. In this case the District Judge held that the *Alva* was not to blame for anchoring in dense fog in the Slue, a much frequented channel. The opinion is not reported. The Circuit Court of Appeals expressed "general concurrence in the views of the learned Judge of the District Court" (p. 231, Fed. Rep.; p. 128 (C. C. A.)

The effect of the Treasury Regulations will be fully discussed under the Fourth Point.

The thickness of the fog when the *Ailsa* anchored is well described by the passenger Pearce, who says that the two ships that passed shortly after, at a distance of only fifty yards, showed like dim spectres through the mist (pp. 191, 192, fols. 764, 765). He was examined six days after the collision (p. 189, fol. 754).

1. The reason given by the pilot for anchoring where he did is satisfactory. The pilot says that he heard so many bells ahead of the *Ailsa* that he was afraid to go further, and so anchored where he did (pp. 58, 59, fols. 232, 233; p. 66, fol. 262; pp. 67, 68; fols. 268, 269; p. 72, fol. 288; p. 80, fol. 318; p. 81, fol. 322). This is corroborated by Captain Morris p. 111, fol. 444; p. 112, fol. 445); by Cote

(p. 145, fol. 519); by the very intelligent passenger, Pearce (p. 201, fol 801); by Smith (p. 209, fol. 833; by Captain Cooley of the *Harold*, who heard bells from three steamers before he heard the *Ailsa's* (pp. 84, 85). The engineer of the *Harold*, Jaycox, testifies to the same effect (p. 95, fol. 378). Counsel for the *Bourgogne* argue that these bells, which did confessedly ring while the *Ailsa* was at anchor, were the bells of vessels that anchored after she had done so. But the only evidence of any vessel that passed after she anchored are of the German steamer, another steamer unknown, and the *Advance*. The *Advance* was, however, certainly not one of the steamers that the *Harold* heard, because she did not approach the *Ailsa* until after the collision and was then under way, while the bells were heard by the Captain of the *Harold* before he saw the *Ailsa* or heard her bell. Captain Poirot lays down on his diagram only two vessels, but he testifies expressly that after he anchored "there were "ships all over to the east and south of my vessel "and the *Werra* * * * six or seven perhaps" (p. 309, fol. 1235).

2. The District Judge goes into an argument to show that no bells or whistles could have been heard when she stopped, because "there were no other steamers within a half mile of her."

One fallacy of his argument is in the assumption that no vessels were moving about in the lower bay, and that we have traced every vessel that did go down that morning. We have shown that the tug *Harold* was "cruising for a job" (p. 85, fol. 337), and there were probably others (p. 293, fol. 1169). What right had the Court to say that there were none, in the face of positive and uncontradicted testimony from unimpeached witnesses, that they heard whistles and bells ahead of the *Ailsa*, before she anchored?

Another fallacy lies in the assumption that the pilot and captain of the *Ailsa* could tell certainly that the steamers referred to were half a mile off. Captain Poirot saw their distance, but this was after the fog lifted. Is this Court prepared to hold that a steamer, running with a swift tide, has the right to speculate whether a bell heard ahead in a dense fog is more or less than 1,500 feet distant? If the *Ailsa* had gone ahead and struck one of these vessels, would she not have been held at fault? How then can it be said that she was to blame for anchoring?

Had she gone farther she would have been in equal danger from the Bourgogne.

3. Another fallacy lies in the assumption that it is possible in a dense fog to tell just where the anchorage line is. The pilot under such circumstances is between Scylla and Charybdis. If he goes too far he runs ashore. If there are vessels ahead he is in danger of running into them. Yet the argument compels him to locate exactly an imaginary line although he can see nothing; to guess accurately as to his bearings, and anchor in just the right place, under peril of forfeiting his right to recover at all, if another ship runs into him.

When the tide is running out he is in this additional dilemma. If he drifts with the tide he has no steerageway. If he makes two knots an hour headway through the water, he makes five knots over the ground, and all agree this is too fast in such a fog. The only rational rule is to require all steamers under such circumstances to anchor where they are. Then all will be secure. On any other rule all are in peril.

4. The argument for respondent is that the anchorage line could be known by the direction of the sound from the fog bell on Fort Lafayette.

The well-known uncertainty of direction of sounds heard in a fog would make this a perilous guide.

5. Even in case of a violation of the sailing rules prescribed by statute, the vessel committing the breach, is not held to be at fault, if it distinctly appears that this did not contribute to the injury. In such cases the violation is of an affirmative requirement, intended to secure active diligence on the part of navigators.

In the case at bar the Treasury regulations have a different function. Their purpose is to provide a convenient anchorage ground, under ordinary circumstances, for vessels intending to remain for some time. The only way in which a violation of them can be said to contribute to a collision is, that the vessel at anchor might not have been run into, if she had not been anchored in the particular place. Such a fault does not constitute contributory negligence, within the meaning of the law.

It is well recognized on land as well at sea, that the violation of a statute does not of necessity bar a plaintiff's right of action.

Of this proposition there are many illustrations in reported cases.

A case exactly in point is where a man is driving on the left-hand side of the road in violation of an ordinance, but that fact is held to be no defense to another who negligently runs into him.

Spofford *vs.* Harlow, 3 Allen, 176.

So also the fact that a person, in violation of a statute, is standing upon the platform of a street railway car, is no defense to an action for injury caused by the driver of a wagon who negligently runs against the car.

Connolly *vs.* Knickerbocker Ice Co., 114 N. Y., 104.

Even a trespasser upon a railway train cannot be lawfully ejected when the train is going at a dangerous speed.

Carter *vs.* Louisville &c. Ry., 98 Ind., 552.

When two men are racing in violation of a statute one of them is liable who wilfully runs into the other, and the violation of the statute is no defense.

Welch *vs.* Wasson, 6 Gray, 505.

"Though one may have wrongfully put himself upon the premises or in the power of another, he has not thereby made himself as to the other an outlaw; and if the other injures him by some disconnected wrongful act, or by the disconnected omission of a duty which even in these circumstances lies upon him, the former may maintain his suit therefor."

Bishop Non-Contract Law, Section 61.

The man who has the last clear chance to avoid the injury and does not, is the man who is its responsible cause.

It is well settled in this Court and in the Court of Appeals of the State of New York, as well as in many other States, that a violation by the injured party of the law against traveling or working on Sunday, is no defence to an action for negligence.

Philadelphia W. & B. R. R. *vs.* Phila. & Havre de Grace Co., 23 How. U. S., 209.

Platz *vs.* City of Cohoes, 89 N. Y., 219.

In the latter case the authorities are collected and analyzed by Judge Danforth.

S. P. Sewell *vs.* Webster, 59 N. H., 586.

Opsall *vs.* Judd. 30 Minn., 126.
Knowlton *vs.* Milwaukee City R. Co., 59 Wis., 278.
Louisville &c. R. Co. *vs.* Frawley, 110 Ind., 18.

In Massachusetts, in which a contrary rule is laid down on this particular point, it is held that the owner of a horse and wagon, who in violation of the Sunday law, lets them for hire on that day, may recover damages for injury caused them by the negligence of the hirer.

Hall *vs.* Corcoran, 107 Mass., 251.
S. P. Frost *vs.* Plumb, 40 Conn., 111.

Whether the *Ailsa* was violating the Treasury regulation, or not, the *Bourgogne* is not excused from exercising due care toward her, and the *Ailsa's* recovery in this case, would not involve an affirmance of her right to anchor in the channel so far as the United States was concerned, but would involve an affirmance of her right not to be negligently run down by the *Bourgogne*. There is a duty of care even towards a violator of the law.

Fourth.

Bourgogne's Other Excuses.

I.—The argument is that it was too late to anchor when off Quarantine. But when the *Bourgogne* passed the red buoy at the tail of the mud flats, her officers saw the Narrows obstructed, they had every reason to believe vessels were at anchor below the Narrows that went down earlier in the day, they knew that there was a dense fog

there and had every reason to believe it was as dense all the way down. The pilot says: "Just after we turned the red buoy I seen it was thick down below," and decided to anchor (p. 379, fol. 1516). If he had acted promptly on this decision all would have been well. He procrastinated and the *Ailsa* was lost.

1. The *Bourgogne* had just passed a steamer (p. 320, fol. 1279; p. 361, fol. 1444), and was thus warned that other vessels were or might be moving in the fog. She knew or ought to have known that other steamers had gone down not long before. When off the red buoy she had ample opportunity to anchor either off Bay Ridge, where the chart shows the anchorage is excellent, or off St. George or Stapleton. Chargeable with knowledge of all these facts, she deliberately went on. It follows that the *Bourgogne* went on at her own risk, and is chargeable with the consequences of whatever happened. She ran the risk of encountering vessels as she went through the Narrows and in the jaws of the Lower Bay, when manœuvering would be difficult and stopping in time might be impossible. All that, too, in the face of the conceded fact that there had been a freshet in the Hudson; that the current was running with unusual speed, and at nearly or quite three knots (p. 58, fol. 232; p. 323, fol. 1290; p. 324, fol. 1293; p. 327, fol. 1306; p. 370, fol. 1480). That would make it difficult for a vessel of the size of the *Bourgogne* to stop, much more to manœuvre with ease. This the event proved, for after she reversed her engines at seven minutes past two (the time given by her engine room log), it took her fifteen minutes to come to an anchor (p. 350, fol. 1390), although her captain, according to his own account, was using great diligence to bring her to an anchor (pp. 407–409).

2. The intrinsic fallacy in this argument consists in forgetting that the more vessels that went down the greater the danger. The first one had a clear field. When the *Ailsa* went down it was not so thick but that her pilot and captain saw Fort Lafayette (p. 77, fol. 306; p. 106, fol. 421, 422). The fog afterwards thickened, the Fort had become invisible, and this warned the *Bourgogne* not to attempt that narrow channel.

The fog on the day of this collision was as thick as it ever is in New York. Such fogs do not often occur, but there is seldom a winter when there is not one. Ferryboats may make their trips at such times, but large ocean steamers can wait and ought to wait. Confessedly they cannot go to sea. What hardship then is it to require them to remain in a place of safety until the fog lifts? The number and size of such steamers increases every year, and with that increase the peril to life and property also increases. The *Ailsa* became a total loss; fortunately no lives were lost but the next time such a collision occurs the passengers may not be so fortunate. As it was, they were in great danger and suffered extreme exposure and hardship (see evid. Pearce, pp. 202–207). All this would have been prevented if the *Bourgogne* had anchored off Bay Ridge or Stapleton.

3. The speed of the *Bourgogne* is proved by the unfailing test of the entries of time in her engine room log (p. 350, fol. 1390). This gives the order to reverse at full speed as seven minutes past two. Her log gives the time she straightened on her course as 1:37" (p. 453, fol. 1810). Her captain says she "was only turned at 1:37 (p. 304, fol. 1213). This makes exactly one-half hour from straightening on her course until the reversing full speed, which every one agrees was almost immediately before the col-

lision. The distance from a point abreast her pier to the place of collision, measured as the channel turns off the red buoy, is at least eight and a half knots. She made this distance in half an hour, which is a speed of seventeen knots over the ground. The tide was with her and accelerated her speed.

Counsel claims to deduct one mile for the drift while she was straightening on her course. That is entirely conjectural. In backing out she would naturally back the stern up stream in order to get the swing of the tide upon the bow to go down. Otherwise the tide would have swung her stern down stream. But her engines were powerful enough to overcome the ebb tide, and were undoubtedly used for that purpose.

But even if she drifted a mile down stream before 1:37, that would make her average speed up to 2:07, fifteen knots. She slowed after passing the red buoy, and her engines were stopped for a minute or two. Her speed to the red buoy was therefore at least seventeen knots, which was unreasonable and excessive in the weather as it was that day. Doubtless one reason why it was difficult to anchor when she reached the red buoy was the great speed of the *Bourgogne* at that time, and this aggravates her fault. Everything indicated an approaching fog and thick weather in the Narrows. Never at any time did they see Fort Lafayette or anything below (pp. 335, 336, fols. 1340–1343). At all times Staten Island was concealed from her (p. 58, fol. 228 ; p. 304, fol. 1215 ; p. 362, fol. 1446). The fog had thickened. When the *Ailsa* went down her pilot and captain saw Fort Lafayette (p. 58, fol. 231 ; p. 81, fol. 324 ; p. 106, fol. 421, 422) and the royal yards of vessels lying at anchor on the Staten Island side (p. 59, fol. 230), and her captain and chief officer saw the crest of the ridge at Fort Tompkins (p. 106, fol. 423 ; p. 136, fol.

544). When the *Bourgogne* went down all was invisible on that side (p. 317, fols. 1265–1267 ; p. 362, fol. 1446 ; p. 371. fol. 1482). She should, therefore, have gone down slowly and under control. She never ought to have got to Quarantine, moving so rapidly that it was impossible to regulate her movements in time to anchor, when anchoring became prudent. A strict ruling on this point is of great importance to the commerce of this country. There were other collisions in the fog that day (p. 62, fol. 246). It is very important that this Court, which makes the law for our harbors, should declare it so clearly and explicitly that such collisions will not occur in the future. The decision will not simply determine the past, but will be a headlight illuminating the future.

II. —*The Bourgogne* relies on the Treasury Regulations, adopted in pursuance of the United States Statute of May 16, 1888. The act authorizes and directs the Secretary of the Treasury to "define and establish an anchorage ground for vessels in the bay and harbor of New York and in the Hudson and East rivers, and to adopt suitable rules and regulations in relation thereto." In pursuance of that power the Secretary of the Treasury has adopted regulations (Record, pp. 491–500).

The *Bourgogne* claims that under these regulations, anchoring in Quarantine grounds is prohibited except to vessels coming in from sea, and that she could not lawfully anchor off Quarantine. To this there are several answers :

1. That Act and the rules under it were intended to point out places where vessels could ordinarily lie. The only indication in the regulations as to what might be done in case of stress of weather or great emergency is at the end of the 18th regulation : (p. 497).

"No vessel shall anchor in any of the following channels: Gedney's Channel, Main Channel, Swash Channel and East Channel, except in cases of great emergency, and then outside of the channels, as marked by the buoys, and only until they can procure assistance."

These channels are all comparatively narrow, and have shoals on either side. They are not defined by the land as are the wider channels in the Upper Bay and through the Narrows. For all these reasons, anchoring in them under any circumstances would be especially dangerous, and is therefore especially prohibited. But in view of the fact that the rules are made for ordinary cases, and point out where vessels may lie for weeks if they choose, taking on or waiting for a cargo; they cannot be construed as prohibiting a vessel from obeying the well-settled rule that it is her duty to anchor at once, when unexpectedly beset with fog, even though in the channel. The Secretary cannot be presumed to have intended to abrogate this established rule of navigation without the clearest evidence; and none such appears, either in the act itself or in the regulations adopted under it.

2. The regulation relating to the Quarantine anchorage is as follows (p. 496):

"NOTE.—No other vessels than those which are detained at Upper Quarantine shall anchor on this anchorage between Fort Tompkins Light and Quarantine Wharf at Castleton, Staten Island."

This wharf is that at the Health Officer's Station.

This regulation did not forbid the *Bourgogne* to anchor at Quarantine. The prohibition extends only to "other vessels than those which are detained at Upper Quarantine." But the *Bourgogne* was detained there by the fog. The rule specifies no

cause for detention, but treats any detention as sufficient cause for anchoring there. Certainly the fog was such a cause.

The anchorage there is 3,000 feet wide (Reg., 17, p. 496), and vessels as large as the *Bourgogne* anchor and swing there with safety (p. 381, fols. 1521, 1522).

No signals were heard from there (p. 377, fols. 1505, 1508). In such a fog no vessels could come in from sea, and therefore the place was safe and anchorage there admissible.

Fifth.

Look-out.

The *Bourgogne* ought to have had a look-out in the cro'-nest. This was 40 feet, 8 inches, above the deck (p. 439, fol. 1755), and no look-out was stationed there (p. 352, fol. 1408). The forecastle deck was only 27 feet above the water (p. 425, fol. 1698). The fog was thickest on the water. Mast-heads could be seen when vessels could not (pp. 313, 314; fols. 1252, 1253). The *Ailsa's* masts were seen as quickly from the *Bourgogne's* bridge as from her forecastle, though that was much nearer; and were seen before her hull (p. 255, fol. 1019; p. 265, fol. 1060; p. 272, fol. 1087; p. 273, fol. 1092; p. 275, fol. 1099).

Giquel, the second captain of the *Bourgogne*, who was on the forecastle (p. 338, fols. 1350, 1352), testified as follows (p. 340, fol. 1358):

"As we were completely in the fog, I looked out very attentively. Suddenly I perceived ahead of me the masts of a ship. I had two blasts of the horn then given, which indicates a vessel ahead, almost right ahead; she was little on the

port hand, but almost right ahead of us. I had the notice sent to the captain by a man who was on service to tell him there was a ship almost right ahead, and I had hardly given this signal before I saw the funnel of the ship. I then sent the order by the same man to inform the captain it is a steamship. And immediately—because these things happen almost simultaneously—I sent an order to the master to say it is a steamship at anchor; all those three events happen almost simultaneously."

Even Murphy, the third officer of the *Ailsa*, who was examined for the *Bourgogne*, admitted that at times, while the *Ailsa* was lying at anchor, he could see the flagstaff of Fort Tompkins, and the grassy slope of the ramparts, both of which are on the crest of the ridge (p. 385, fol. 1539).

It is altogether probable that a look-out aloft might have descried her masts in time to avoid the collision.

Limpaler, who was on the *Bourgogne's* forecastle, says: "If we had seen her three seconds sooner we would not have touched her" (p. 268, fol. 1069).

Sixth.

Backing away from Sinking Ship.

The fact that the *Bourgogne* backed away from the *Ailsa*, and rendered no assistance, raises a strong presumption of fault which there is nothing in her evidence to overcome. There was no hail from the *Bourgogne* to the *Ailsa* (p. 194, fol. 775; p. 212, fol. 845; p. 223, fol. 892). This testimony of the *Ailsa's* witnesses is not denied by any one from the *Bourgogne*. However excellent the captain's intentions were (as shown by his getting ready to lower his boats), nothing in fact

was done for the *Ailsa*, and the movements which the pilot determined upon were such as would inevitably carry the *Bourgogne* to such a distance that no relief could be afforded. The obvious thing to do would be to stop the engines immediately after the collision. Reversing had swung her bow to starboard, and if she had gone straight on in that direction she would have passed the *Ailsa* near enough to communicate and render assistance, but not near enough to do injury. But backing for four minutes or for three, threw her head so much to starboard that when she came to make the swing that she did, it would certainly bring her a great way off from the *Ailsa* and a long way below her, as in fact it did.

The statute provides that under such circumstances the presumption of fault is against the steamer that does not stay by the sinking ship and render her assistance. "If he fails so to do, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect or default" (26 Stat. at Large, p. 425, § 1). This statute by Proclamation of the President took effect December 11, 1890 (*Ibid.*, p. 1561). That statute formulates a reasonable rule of law, which the Courts recognized before the statute.

The *Atlas*, 4 Bened., 27.
The *America*, L. R., 4 Adm. & Ecc., 226.
The *Adriatic*, 33 Law Times, N. S., 104.

The English statute is to the same effect.
36 and 37 Vict., c. 85, § 16.

If the pilot had been conscious that he had been entirely justified in getting into that fog, his first

impulse would have been to go alongside of the *Ailsa* and help her, if he could. But if he was conscious that he had failed to comply with Captain Poirot's reasonable request, that he had taken a risk he ought not to have taken, and that the consequence was injury to another vessel, his impulse would be to get away as quickly as he could, hoping that he might get out of sight and it never would be known that he had caused the injury. It happened that the *Bourgogne* was somewhat injured and had to come back to port, but this he could not foresee.

Seventh.

Too Frequent Whistling.

Article 12 of the Rules of Navigation of 1885 and Article 15 of the Rules of 1890 alike require that "a steam vessel having way upon her shall sound, at intervals of not more than two minutes, a prolonged blast."

In Article 15 of 1890 "prolonged blast" is defined to mean "a blast of from four to six seconds' duration."

This is a just definition of the words used, and not the arbitrary enactment of a statute.

The object of the requirement is to enable other vessels, charged with some duty with reference to the approaching steamer, to hear her approach. But it must be construed reasonably. In the case of a steamer approaching a sailing vessel or a vessel at anchor, it is much more important that she should hear them than that they should hear her. Article 23 of the Rules of 1885 and Article 27 of the Rules of 1890 alike provide:

"In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

This the *Bourgogne* should have considered when the orders were given as to the whistle.

It is plain on the evidence that the *Bourgogne* whistled so constantly that her officers and lookout could not hear the signals of other vessels.

I.—The report to the Consul General and the statement in the log agree that the *Bourgogne's* whistle was blown at very short intervals, "as you might say almost continuallly" (p. 450, fol. 1797). Rempler, who was on the bridge, admits the correctness of this phrase (p. 405, fols. 1617, 1618), and so does Giquel, who was on the forecastle head (p. 343, fol. 1370). Capt. Poirot says: "Probably every twenty seconds, perhaps oftener" (p. 313, fol. 1252). It was a "very heavy" whistle (p. 321, fol. 1281). When the *Bourgogne* slowed, there was no propriety in whistling so frequently. The inevitable tendency was to dull the hearing of those who were charged to observe the signals from other vessels, and it is in that way that we may account for their failure to hear the bell of the *Ailsa*.

The tendency of too frequent blowings is to dull the hearing of a person on watch. The impression it made on Lemoyne, who was on the forecastle, was that she "blew the whistle all the time" (p. 262, fol. 1048). Captain Poirot was pressed on that subject on cross examination. Counsel for the *Bourgogne* saw the importance of it and recalled the captain to explain it. He said the International Rules require the whistle to be blown every two minutes, but probably that was intended for slower vessels, and that it wasn't enough now

(p. 405, fol. 1620). We asked him if that didn't depend upon the speed of the vessel, and he admitted it did (p. 406, fol. 1624). A vessel running at the rate of fifteen knots an hour, runs a knot in four minutes, and two whistles within the space of a knot would be small warning of approach. But when a vessel is going slowly as the *Bourgogne* is alleged to have been, the conditions are entirely changed. The only way in which one can tell the motion of an approaching vessel is by the observation of successive whistles. If they are blown so frequently as this, they tend to run into each other. There is a certain reverberation, especially in passing between the bluffs on either side of the Narrows.

II.—The best evidence that either this, or negligence, prevented the *Bourgogne's* outlook from hearing the *Ailsa's* bell, is the admitted fact, that other vessels and tugs passed up and down, or were at anchor; yet the *Bourgogne* heard no signal whatever from any other vessel until she anchored, except a whistle from a following steamer as she entered the fog, and one or two whistles from tugs (p. 263, fol. 1051; p. 265, fol. 1060; p. 275, fol. 1093; p. 283, fol. 1132; p. 321, fols. 1283, 1284). Lecouedic, one of her lookouts, did not hear even the great bell on Fort Lafayette (p. 256, fol. 1023; p. 257, fol. 1028). There were six or seven vessels at anchor, they were seen when the fog lifted, and their bells were heard to ring after the *Bourgogne* came to anchor, yet her witnesses heard none of them before, except Capt. Poirot, and he heard only the *Werra's*. The pilot and Giquel (who was on the forecastle head) did not hear even this before the *Bourgogne* anchored (p. 366, fol. 1462; p. 372, fol. 1487; p. 341, fol. 1363; p. 343, fol. 1371; p. 344, fol. 1376). These bells were heard on the *Ailsa*, and ought to have been on the *Bourgogne*.

III.—Capt. Beers, of the *Advance*, testifies that before he saw the *Ailsa*, he heard her three alarm whistles after the accident (p. 291, fol. 1162). Watson, the pilot of the *Advance*, heard them several times (pp. 412, 413, fols. 1648, 1649). Capt. Cooley and Frank Jaycox heard them on the *Harold* (p 88, fol. 351; p. 99, fol. 393). The *Ailsa*, naturally, would blow them. Nelson swears he did blow them (p. 164, fol. 656). Yet those were not heard on the *Bourgogne* (p. 329, fol. 313). One reason that Capt. Poirot gives for this is: "My whistle was going, too" (p. 329, fol. 313).

The captain's only explanation of this is that they were to leeward of him. But in fact they were to windward. The wind was S. S. E., and he passed to the westward of them. Giquel cannot explain his not hearing them (p. 344, fol. 1375).

IV.—This fact that signals were heard by other vessels in the same fog, disposes of the claim that some condition of the atmosphere may have prevented the witnesses on the *Bourgogne* from hearing the *Ailsa's* bell.

V.—Why, then, it is asked, were not the *Bourgogne's* whistles heard on the *Ailsa?* The answer is twofold:

(*a.*) Whistles were heard by the pilot, but amid the multiplicity of signals were not recognized as those of the *Bourgogne* (p. 62, fol. 246; p. 71, fol. 284).

(*b.*) Those on the *Ailsa*, being at anchor, were charged with no duty of discrimination between the various signals that they heard. She was bound to keep her place and ring her bell, and could do nothing more.

VI.—(1.) That the bell was rung continuously from the time the *Ailsa* anchored until the moment

of collision is proved by overwhelming testimony which the Courts below did not discredit.

Capt. Shooks, p. 60, fols. 239, 240; p. 61, fol. 242.
Capt. Morris, p. 125, fol. 500; p. 126.
Capt. Cote, first officer, p. 139, fols. 554, 555; p. 147, p. 159.
Mr. Nelson, 2d Officer, p. 161, fol. 642; p. 163, fol. 692.
Tietjens, passenger, p. 178; p. 179, fol. 714; p. 181, fols. 723, 724; pp. 182, 183.

He says: "I can positively swear all the time I "was in the cabin I could hear the bell ringing" (pp. 183, 184, fols. 732, 733).

Lazmore, purser, p. 186, fol. 741.
Pearce, passenger, Postmaster of the Island of Jamaica, p. 192, fol. 768; p. 195, fol. 780; p. 196, fol. 781; pp. 198, 199.
Smith, seaman, pp. 208-210, fols. 832-838.
Vitolani, pp. 222, 223, fols. 886-889.
Santos, pp. 227, 228, fols. 906-910.

This testimony is confirmed by the testimony of Capt. Cooley of the *Harold*, and Jaycox, engineer of the same tug. They actually heard the bell before they saw the *Ailsa*, and it guided them to that steamer just before the collision (pp. 86, 87, fols. 341-345; p. 95, fols. 378-380).

Slight discrepancies as to length of time and order of events, strengthen, rather than impair, the force of their evidence.

The bell was a good bell, of the usual size (p. 135, fol. 538), and was produced and rung on the trial (p. 437, fol. 1747; p. 159, fol. 534).

2. Mr. Murphy, the disloyal officer who goes to the other side with the proffer of his services (p. 393, fol. 1572) does not pretend to say positively that the bell was not rung. He says he was loitering around the deck, not on duty, and was talking to different people—he talked to the cooks and some of the others (p. 383, fol. 1532)—but when he was pressed he was not willing to say the bell was not rung, but said he was not paying attention (p. 386, fol. 1544).

Murphy's testimony is of little weight of itself. But it is hopelessly discredited:

(*a.*) By the uncontradicted evidence of two witnesses that he had threatened to "get even with the captain for reporting him for having lost the log on the previous voyage" (p. 428, fol. 1712; p. 431, fol. 1722).

(*b.*) By the proof from Prof. Compton's trigonometrical survey (pp. 251–253) that the place where Murphy located the wreck (pp. 425. 426) was absolutely erroneous. The Court, on the trial, observed that the discrepancy between Capt. Morris' location of the wreck (*Ailsa*, Ex. 1, pp. 115–117; p. 118, fol. 469) and that of Murphy, was too great to be accidental. Now, the former is shown to be right, and the latter to be wrong. This reinforces Morris' whole testimony, and hopelessly discredits Murphy.

3. Russell, the baker, turned up drunk at the last moment, when it was too late to supply his place (p. 438). He was called to show that shortly before the collision the bell wasn't ringing. The evidence of his intoxication was not necessary to discredit him. He swears that the bell was never rung before the collision (p. 298, fol. 1190). While Capt. Poirot (p. 306, fols. 1223, 1224) and other witnesses from the *Bourgogne* (p. 268, fol. 1071; p. 272, fol. 1086; p. 345, fol. 1380; p. 402, fol.

1608) admit that the *Ailsa's* bell was rung after they saw her and before the collision. False witnesses always overdo their testimony.

4. A similar contention has been made in other cases. But where the evidence of the officers and men of the vessel at anchor is explicit as to the ringing of the bell, the Court has attributed the failure of the steamer to hear it to other causes.

In the *Fulda*, 52 F. R., 400, the Court attributed such failure to

" the noise and commotion attendant on the navigation."

This is supported by

The *Buffalo*, 50 Fed. Rep., 630; affd. 55 F. R., 1019.

The evidence of witnesses as to what was actually done on their own vessel is entitled to more weight than negative evidence from the approaching ship, or the opinions of witnesses on the latter.

The *Grace Girdler*, 7 Wall., 196, 200.
The *Alberta*, 23 Fed. Rep., 807, 810.

Eighth.

Inevitable Accident.

The defense of inevitable accident was not sustained in the Courts below. The fact that the fog was dense and that it was impossible for the *Bourgogne* to see the *Ailsa* in time to avoid a collision does not prove inevitable accident.

This Court thus state the rule in

Union S. S. Co. vs. *N. Y. & Va. S. S. Co.*, 24 How., 307:

"Inevitable accident, as applied to cases of this description, must be understood to mean 'a collision which occurs when both parties have endeavored, by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident.' It is not inevitable accident * * * 'where a master proceeds carelessly on his voyage, and afterwards circumstances arise when it is too late for him to do what is fit and proper to be done.'"

S. P. *The Buffalo*, 55 F. R., 1019; affg. 50 F. R., 630.
The Oswego, 71 F. R., 537.
The Rockaway, 25 Fed. Rep., 775.
The John Adams, 1 Cliff, 404.
The Baltic, 2 Bened, 452.

Ninth.

The motion for a certiorari should be granted.

EVERETT P. WHEELER,
Advocate for Petitioner.

Brief of Jones for Respondent

Supreme Court of the United States,

OCTOBER TERM, 1898.

Filed Nov. 7, 1898.

In the Matter

of

The Petition of the ATLAS STEAMSHIP COMPANY for a Writ of *Certiorari* to the U. S. Circuit Court of Appeals for the Second Circuit.

In the Matter

of

The Application of CHARLES B. WHEELER for a Writ of *Certiorari* to the U. S. Circuit Court of Appeals for the Second Circuit.

MEMORANDUM IN OPPOSITION TO APPLICATIONS FOR WRITS OF CERTIORARI.

EUSTIS, JONES & GOVIN,
Proctors for La Bourgogne,
No. 45 Cedar Street,
New York.

EDWARD K. JONES,
Advocate.

LEXINGTON BOOKBINDING CO., 63-67 DUANE ST., N. Y.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1898.

In the Matter

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In the Matter

OF

The Application of CHARLES B. WHEELER for a Writ of *Certiorari* to the U. S. Circuit Court of Appeals for the Second Circuit.

Memorandum in Opposition to Applications for Writs of Certiorari.

It is conceived that these two applications may be briefly disposed of by a few general observations and references to the case.

First.

The affidavit of Mr. Jones, one of the *Bourgogne's* proctors, shows not only that mandates have been issued from the Circuit Court of Appeals to the District Court in both these cases, but that the decree in the Wheeler case has been entirely satisfied. Furthermore, these two applications represent but a comparatively minor interest in the whole, because the major

portion of the litigants having satisfied the decrees as to them make no application for a writ of *certiorari*.

Second.

Every question involved in these cases is a pure *question of fact*. There is no new or controverted question of law in them.

The District Court and the Circuit Court of Appeals are unanimously of the same opinion upon all these questions of fact, and this Court has repeatedly held that it will not issue a writ of *certiorari* to review questions of fact.

See Compania La Flecha *v.* Brauer, 168 U. S., 104; and cases there cited.
Stuart *v.* Hayden, 169 U. S., 1.
Baker *v.* Cummings, *ib.* 198; and
Wuppermann *v.* the Steamship *Carib Prince* (not yet reported in the official reports but published in the N. Y. Law Journal, June 3rd, 1898).

Third.

The only two questions in the case which by any possibility could be given the aspect of questions of law are first, whether *La Bourgogne* was under the legal obligation to absolutely stop and anchor when she encountered the fog; and secondly, whether the *Ailsa* was legally at fault for anchoring outside the anchorage limits; but obviously these questions both resolve themselves into questions of prudent navigation independently of any questions of law and, therefore, present pure questions of fact.

Moreover, the rule of law that a vessel in a fog so dense that she cannot be navigated with safety shall come to anchor as soon as practicable is a rule of law

about which there is no question and which has been established by the repeated declarations of the Courts of England and this country for fully thirty years past. This rule of law is not denied. The real question here is whether the circumstances were such as to make that rule operative, and both the District Court and the Circuit Court of Appeals upon that question of fact decided that it was not operative.

Furthermore, as to the place of anchorage of the *Ailsa* there can be no question as to the law upon that subject. (See cases cited under Second Point of the *Bourgogne's* Brief in the Circuit Court of Appeals herewith presented.) But this is really a question of fact, namely, as to whether or not there was any necessity for the *Ailsa* to have anchored in an improper place, and the District Court and the Circuit Court of Appeals both decided unanimously that there was no such necessity.

Fourth.

There are one or two mis-statements of fact in the petitions which may be noticed. In the first place, the petition of the Atlas Steamship Company (fol. 16) and the petition of Wheeler (page 4) both state in substance that as the *Bourgogne approached* Quarantine she lost sight of Fort Hamilton, and the captain then said to the pilot that they ought to anchor, but the pilot decided not to anchor north of the Narrows, but to go through to Gravesend Bay.

This is an absolute mis-statement of the fact, because the evidence shows (*Bourgogne's* Brief in the Circuit Court of Appeals, pp. 15–16, submitted herewith), first, that there was no disagreement whatever between the captain and the pilot as to the place of anchorage; and, secondly, that the question of anchoring arose when the *Bourgogne* was *below* Quarantine, and when she, therefore, could not turn round in the channel

and anchor above Quarantine. This was the reason she went into Gravesend Bay, the usual place of anchorage, just as every other vessel did that went down that day in the same condition of the weather.

Fifth.

The petitions of both the Atlas Steamship Company and Wheeler also state (fol. 14 of the Atlas Co.'s Petition, paragraph fifth of Wheeler's petition) that the *Ailsa* while proceeding to anchor in Gravesend Bay heard bells of vessels at anchor ahead of her and not venturing to go further stopped and cast anchor, which is evidently their excuse for not going into Gravesend Bay.

This statement is shown by the evidence in the case to be absolutely an error (see *Bourgogne's* Brief in Circuit Court of Appeals, p. 45), there being no vessels anywhere near where the *Ailsa* anchored.

Sixth.

Great stress seems to be laid in the petition, as it was in both the District Court and in the Circuit Court of Appeals, upon the statement of the captain of the *Bourgogne* to the effect that he was sounding his whistle "almost continually," and it is sought to be argued here, as it was in the courts below, that this so deadened the capacity of the officers and men of the *Bourgogne* to hear other sounds that they could not hear the bell of the *Ailsa;* but the captain states distinctly (fol. 1619 of the Record) as to what he means by this expression in French "presque continuellement," by saying that it is perfectly evident that he did not have the whistle blown in such a manner that he could not hear what was going on, and furthermore, at fol. 1252 he states that the whistle was blown probably every twenty seconds, perhaps oftener.

But it is manifest that this expression, "Almost continually," made by the Captain of the *Bourgogne*, is one of those expressions which we find that even this Court, careful as it is in what it says, has at least on one occasion indulged in.

In the case of the *Colorado*, 1 Otto, 692, this Court, in defining the precautions to be taken by a vessel in a fog, uses the following words:

> "The best precautions are bright signal lights; very low speed—just sufficient to subject the vessel to the command of her helm; competent lookouts properly stationed and vigilant in the performance of their duties; *constant* ringing of the bell or blowing of the fog-horn, as the case may be, and sufficient force at the wheel to effect, if necessary, a prompt change in the course of the vessel."

We suppose that Captain Poirot will be as easily excused for this mode of expression as the Judges of this Court.

Seventh.

Counsel for the *Bourgogne* has had no opportunity to examine the briefs of the counsel for the petitioners in this case. He assumes, however, that in this Court the counsel have made as many mis-statements of fact as were made in the Circuit Court of Appeals. If the Court will examine our brief in the Circuit Court of Appeals under the Thirteenth Point (page 55) it will appear that the counsel made no less than fourteen different mis-statements of fact there, and we assume that there will be a like discrepancy between the real facts and the statements of counsel in their brief on this application.

Eighth.

It is not deemed necessary to go further into the case, and we, therefore, leave the matter, so far as the details of the case are concerned, to the brief in behalf of the *Bourgogne* in the Circuit Court of Appeals.

We respectfnlly submit that both applications should be denied.

EUSTIS, JONES & GOVIN,

Proctors for *La Bourgogne.*

EDWARD K. JONES,

Advocate.

NOV 7 1898
JAMES H. McKENNEY,
Clerk

Appt. to print & Jones for Respondent
(Brf in C. of A.)

United States Circuit Court of Appeals

Filed Nov. 7, 1898.

SECOND CIRCUIT.

ATLAS STEAMSHIP COMPANY,
Libellant and Appellant,

vs.

The Steamship LA BOURGOGNE, her engines, etc., COMPAGNIE GENERALE TRANSATLANTIQUE,
Claimant and Appellee.

No. 21.

CHARLES B. WHEELER,
Libellant and Appellant,

vs.

The Steamship LA BOURGOGNE, her engines, etc., COMPAGNIE GENERALE TRANSATLANTIQUE,
Claimant and Appellee.

No. 22.

WESTERN ASSURANCE COMPANY OF TORONTO and others,
Libellants and Appellants,

vs.

The Steamship LA BOURGOGNE, her engines, etc., COMPAGNIE GENERALE TRANSATLANTIQUE,
Claimant and Appellee.

No. 23.

Brief in Behalf of La Bourgogne.

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Proctors for LA BOURGOGNE.

ROBERT D. BENEDICT,
EDWARD K. JONES,
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LIVINGSTON MIDDLEDITCH CO., 68-87 DUANE ST., N. Y.

United States Circuit Court of Appeals

SECOND CIRCUIT.

ATLAS STEAMSHIP COMPANY,
Libellant & Appellant,

vs.

The Steamship LA BOURGOGNE, her engines, etc., Compagnie Generale Transatlantique,
Claimant & Appellee.

CHARLES B. WHEELER,
Libellant & Appellant,

vs.

The Steamship LA BOURGOGNE, her engines, etc., Compagnie Generale Transatlantique,
Claimant & Appellee.

WESTERN ASSURANCE COMPANY OF TORONTO & Others,
Libellants & Appellants,

vs.

The Steamship LA BOURGOGNE, her engines, etc., Compagnie Generale Transatlantique,
Claimant & Appellee.

Brief in Behalf of La Bourgogne.

Statement.

On the afternoon of Saturday, February 29th, 1896, a collision occurred between the steamship *La Bour-*

gogne and the steamship *Ailsa* in the Lower Bay of New York, below the Narrows.

The *Ailsa* left her pier a little after 12 o'clock on a voyage from New York to the West Indies. The weather was rainy when she started. As she went down towards the Narrows a fog was encountered, so that her master and pilot determined to anchor (Libel, fol. 16). They kept on till after they had passed Fort Lafayette about half a mile, and then came to anchor at about a quarter past one. The tide was setting out, and as the *Ailsa* lay at anchor she headed against it about North by West.

The *Bourgogne* left her pier at the foot of Morton street, at a little after one o'clock, on a voyage from New York to Havre. The weather continuing the same, the *Bourgogne* also found, when she was a little below Quarantine, that the fog was so thick as to make it dangerous to proceed to sea. Her captain and pilot, therefore, on consultation, determined to anchor. They were then below Quarantine. The Treasury regulations forbade anchoring on the west side of the channel, and, moreover, the fog was less dense on the eastern side of the channel. Accordingly, the captain and pilot determined to go to Gravesend Bay, as the nearest anchorage ground for a vessel so large as the *Bourgogne*. The steamer accordingly kept on at as slow a rate of speed as was consistent with control of the ship, her engines being by turns stopped and started ahead again slowly. She was heading S. 11° E. or S. by E. true (fols. 1218, 1451). After passing Fort Lafayette her engines were stopped entirely, the vessel going under her headway and the force of the tide for a short time. The order was given to change the helm so as to put the head of the ship to port, in order to run out of the channel to the anchorage ground in Gravesend Bay. But, before any material change had been made in the heading of the *Bourgogne*, her lookout sighted the *Ailsa* about ahead, but a little on the port bow.

The *Ailsa* was immediately reported, and the engines of the *Bourgogne* were at once reversed at full speed and her helm starboarded to swing her head to the west-

ward, but before the headway of the *Bourgogne* could be stopped, she came in collision with the *Ailsa*, nearly head on but on the port side, doing serious injury to the *Ailsa*. Under her reversed engine the *Bourgogne* backed away from the *Ailsa* to what the master of the *Bourgogne* considered a safe distance to avoid being carried upon her again by the tide, and then he went ahead (the reversal of his engine having swung his head to starboard sufficiently to clear the *Ailsa*), and passed astern of her, reversing and going ahead so as to keep his vessel in about the same place (fol. 1226), until, when he had reached what he deemed a safe distance, he came to anchor.

After the collision the *Ailsa's* anchor was got up and her engines started ahead to run her ashore, which was done. While she was going towards the shore the steamer *Advance*, which was also going to the anchorage ground, made her appearance and crossed the *Ailsa's* bows in such a position that the master and pilot saw the *Ailsa* bring up in shallower water and sink. The *Advance* anchored some distance below where the *Ailsa* sank.

No signal of the *Ailsa* calling for assistance had been heard on board of the *Bourgogne*. As soon as she anchored her boats were prepared ready to render assistance in case it should be found that they were needed, but nothing was heard from the *Ailsa*.

The fog having cleared up about an hour and a half afterwards, the masts of the *Ailsa* were seen above the water where she had sunk, northward and eastward of where the *Bourgogne* was at anchor. The German Lloyd's steamer *Werra* was lying at anchor about 300 or 350 yards to the eastward and abreast of the *Bourgogne;* the *Advance* was at anchor to the northward and eastward of the *Werra*; and to the southward and eastward of the *Werra* were six or seven other vessels at anchor, among them the Cunarder, *Campania*. No other vessel was seen at anchor north of the *Bourgogne*.

From the time when the *Bourgogne* ran into the fog her whistles were blown at intervals of 30 or 40 seconds.

None of her whistles were heard on board of the *Ailsa*.

It is claimed by the *Ailsa* that her bell was being rung continually after she anchored. But her bell was not heard on the *Bourgogne* until after the *Ailsa* was seen. An officer of the *Ailsa* was on her bridge before the collision. Whether it was the first or the second officer is in dispute; and whether her bell was rung as the *Bourgogne* was approaching is also in dispute. She had no man on watch on her forecastle deck. Her pilot says he was on deck under the bridge. Her master was in his room.

The regulations of the Secretary of the Treasury of the United States in relation to the anchoring of vessels in New York Harbor, which have the force of law, issued on the 5th of July, 1889, were put in evidence (fol. 1696). They begin by providing as follows: "The following described anchorage grounds for vessels in the Bay and Harbor of New York and in the Hudson and East Rivers are hereby defined and established, and the following rules and regulations in relation thereto are hereby adopted and published for the government of the owners, masters or persons in charge of any vessel in the Port of New York," etc., etc.

"*Eastern Anchorages. Upper and Lower Bays.*"

"Vessels may anchor within the following limits: 15. * * * To the eastward of a range passing through Buoy 18 off Owl's Head, the western edge of Long Island in the Narrows and the eastern side of Fort Lafayette as far south as the East Channel, between Buoys 4 and 2."

"*Staten Island Anchorage.*"

17. "Vessels may anchor, * * * * * to the westward of a line from Robbin's Reef Lighthouse through a point one thousand yards east of the Quarantine Wharf at Clifton, to the buoy on Craven Shoal * * *.

"The part of anchorage 17 lying between its northern

boundary and a line running parallel thereto and 800 yards south of said boundary is reserved for ships of war of all nations and vessels of the United States Government.

"NOTE: No other vessels than those which are detained at Upper Quarantine shall anchor on this anchorage between Fort Tompkins Light and Quarantine Wharf at Clifton, Staten Island."

Cross libels were filed by the owners of the *Ailsa* and the owners of the *Bourgogne*, and libels against both steamers were filed by the insurers of the cargo on board the *Ailsa* and by passengers on her.

The District Court dismissed the libels against the *Bourgogne*, and the libellants against her appeal.

The facts concerning the collision in this case and the law applicable to them show, as we contend on behalf of the *Bourgogne*, that she was wholly without fault, whilst the *Ailsa* was guilty of all the faults charged against her in the *Bourgogne's* libel, and that the decree of the District Court should be affirmed.

The brief of counsel for the *Ailsa* charges four faults upon the *Bourgogne*. (Brief, p. 5.) Only one of them was thought of in the beginning enough to be mentioned in the libel of the owners of the *Ailsa*.

But before taking them up for discussion in order, we present one or two points on the law of the case.

FIRST POINT.

The burden of proof is on the Ailsa, not on the Bourgogne.

It is claimed by counsel for the *Ailsa* that the law is that "Where a collision takes place between a vessel in motion and a vessel at anchor, the burden of proof is on the vessel in motion to show that the collision occurred without fault on her part." We maintain, on the other hand, that the rule of law is that where a collision takes place between a vessel in motion and a

vessel at anchor, the duty devolves upon the vessel at anchor *first* to show that she was anchored in a proper place, and observed proper precautions, and *thereafter* the burden is on the vessel in motion. We maintain that such is the effect of the cases cited on the appellant's brief (pp. 9–10), as well as many other cases.

Thus, in the case of *The Lady Franklin*, the Court had found that the anchored vessel was in a proper place, and the collision was in daylight and in clear weather. On those facts the language quoted in the *Ailsa's* counsel's brief from Judge Lowell's opinion states the rule; but it is in no way applicable to the present case.

In the cases of *The Rockaway*, *The Blue Bell* and *The Otter*, the vessel at anchor was also anchored in a proper place. All these cases, therefore, are subject to the same criticism.

In the case of *The Louisiana*, the vessel that was injured was aground on a bar outside of the channel.

In the case of *The Granite State* the vessel injured was lying at a wharf.

In the case of *The Annot Lyle*, the language of the decision of the Court is that where a "*ship is properly anchored and has a light set*, then the burden of proof is on the vessel in motion," which is the rule as we maintain it to be.

So in The *Indus*, the burden is put upon the vessel in motion to avoid a vessel at anchor "if the latter can be seen." And the *Indus* was anchored in a proper place.

The case of The *Bothnia* was only a question of pleading.

The case of The *Baltic* was the case of a collision in broad daylight on a clear day. And in that case a vessel, which was at a pier but where she had no right to lie, was held in fault for so lying.

In the case of The *Meanatchy* and in the case of The *Batavier* the vessels at anchor were held to be anchored in a proper place.

No case is cited on behalf of the appellants which lays down the rule as the appellant's brief claims it to be.

Marsden on Collisions (p. 31) says "that in case of a collision between a ship under way and another at anchor, *provided there was no negligence of the latter in respect to her lights or place of anchoring*, the burden is upon the other ship to show she was not in fault."

A striking case to show that the rule is as we claim, and that the burden of proof is on the *Ailsa* while no presumption is raised against the *Bourgogne*, is the case of The *Chauncey M. Depew*, 59 Fed. R., 791, 794. In that case a derrick was anchored in the East River, not on anchorage ground, for the purpose of raising a sunken vessel, and though the Court found that the anchoring of the derrick was not, under the circumstances, unlawful, it nevertheless held that other vessels were *only required to use ordinary care and diligence* to avoid collision, and that the fact of collision raised no presumption of negligence. The learned Judge said: "As regards the claims made against the tugs, it is to be observed that the derrick, on the other hand, not lying upon any authorized anchorage ground, *was not entitled to all the immunities of vessels so anchored and lying out of the usual channel way.* Her position, on the contrary, was in the channel way, and though lawful (a permit having been given by the Secretary of the Treasury) was in the midst of busy traffic, where her presence at times added greatly to the difficulties of navigation by other vessels. Those vessels were doubtless, required to use skill and diligence to avoid the derrick and each other; but they were not otherwise answerable for the results. And in determining whether skill and diligence have been exercised, *the mere fact of collision* with the derrick in a place like this is *no prima facie evidence of negligence*, as in the ordinary case of a collision with a wharf, or with a vessel moored at a wharf, or upon ground out of the channel way and set apart for anchorage."

SECOND POINT.

If the Ailsa was at anchor in an improper and prohibited place she must take the consequences and suffer the whole loss in this case.

In The *Clarita* and the *Clara*, 23 Wall., 1–14, the Supreme Court of the United States, through Mr. Justice CLIFFORD, said :

" Undoubtedly if a vessel anchors in an improper place she must take the consequences of her own improper act ;" and the Court refers to the case of Strout *v.* Foster, 1 How., 89, in support of this view.

In that case it appears that the ship *Harriet* anchored in one of the passes of the Mississippi River, and the *Louisville*, another vessel, ran afoul of her whilst coming in.

Mr. Justice MCKINLEY, in deciding the case at Circuit, said :

" The misconduct on the part of the master of the *Harriet*, in anchoring his ship immediately in the thoroughfare, is fully made out by the proof ; while, on the contrary, there is no fault proved, going to show mismanagement, want of skill or negligence on the part of the master of the *Louisville*. It is true that the opinions of some nautical men, found in the evidence, show that it was possible for the *Louisville* to have avoided the collision, *had everything been done that it was possible to do. But the law imposes no such diligence on the party in this case; so far as the Harrie was concerned, the Louisville was entitled to the full use of the thoroughfare of the pass ;* the master of the *Harriet* having obstructed it with a full knowledge of the danger of doing so, has been guilty of such misconduct as to deprive the appellees of the right of action against the appellants."

" It was insisted by the counsel of the appellees that the *Harriet* being at anchor and the other ship

under sail, that the latter was, therefore, liable. It is true, that if a ship be at anchor, with no sail set, and in a proper place for anchoring, and another ship under sail occasions damage to her, the latter is liable. But the place where the *Harriet* anchored was an improper place, and, therefore, the appellees must abide the consequences of the misconduct of the master."

Strout *v.* Foster, 1 How., 90, 92.

The doctrine of the case of Strout *v.* Foster has been repeatedly affirmed in other American and English cases.

See,

The *Scioto*, 2 Ware, 360.
The *Marcia Tribou*, 2 Sprague, 17.
The *Bedford*, 5 Blatch., 201.
The *Helen*, 1 Fed. Rep., 923.
The *Henry Warner*, 29 Fed. Rep., 601.
Lambert *v.* Staten Island R. R. Co., 70 N. Y., 108.

Counsel for the *Ailsa* has made no reference to any of these cases except to the case of Strout *v.* Foster, which he says (Brief, p. 10) is "not authority for any purpose," because the Supreme Court was equally divided. Counsel should have seen that the point on which the Court was divided was not the one for which we quoted the case as authority.—As to that point it was cited as authority by the Supreme Court itself in the case of The *Clarita & Clara*, and that should have been, we think, sufficient for the counsel of the *Ailsa*.

The English case of The *Kjobenhavn* (2 Asp. N. S., 213) is particularly in point.

In that case The *Kjobenhavn*, which was at anchor *in an improper place* was run into by the *Mermaid* and was libelled in behalf of the *Mermaid*, which alleged as the fault that the *Kjobenhavn* was anchored in an improper place. The Court found that it was an improper place, and proceeded to examine the excuse which the *Kjobenhavn* gave for her being

at anchor there, viz., that she had come into collision with *a brig at anchor in an improper place.* And the Court considered that her responsibility for the second collision depended upon whether she was in fault in the first; that is, whether the place of anchorage was forced upon her without her fault. As to the first collision the Court said:

"It appears clear upon the evidence that the brig was anchored in an improper place, in a place in which she should not have anchored without excuse. The fog seems to have been her excuse for dropping her anchor there, but still she was in a place in which a steamer coming up the river would not reasonably expect to find a vessel at anchor. Taking into consideration these circumstances, the moderate speed at which the vessel was proceeding (she was going at half speed), that she was proceeding under a port helm, and that, owing to the fog, she could not see the brig earlier than she did, their lordships are of the opinion that the *Kjobenhavn* cannot be said to have been in fault in respect of *that collision.*"

That is to say, the Court excused the otherwise improper anchorage of the *Kjobenhavn*, because it was forced upon her by a very recent collision with a brig in which she was *not at fault, because the brig was anchored in an improper place.*

That first and excused collision is exactly the case of the *Bourgogne.*

THIRD POINT.

The Bourgogne was not in fault for proceeding through the Narrows to an anchorage.

The principal charge which is made against *La Bourgogne*, in fact the only one which was made in the libel of the owners of the *Ailsa*, is that she was in fault in proceeding through the Narrows at all, in the condition of the weather then existing. Counsel for the *Ailsa* calls it the "radical fault," (Brief, p. 10).

(*a.*) It is shown that four steamers, the *Ailsa*, the *Werra*, the *Bourgogne* and the *Advance* went down the Bay about the same time. Shortly after them came the *Seneca* and one of the Hamburg steamers.

(*b.*) The *Galileo* went partly down the Bay, but when cannot be determined. Her pilot testified that he went down about half past 12 o'clock (fols. 401–2), anchoring off Stapleton about 2; and that he saw the *Ailsa* and the *Bourgogne* as they went down, while he was at anchor off Stapleton, and about 3 P. M. (fol. 412) which was nearly two hours after the collision. But thereupon the *Ailsa* recalled her pilot, Shooks, to prove that, when the *Ailsa* went down about half past twelve, he saw the *Galileo* at anchor just below the Statue of Liberty (fol. 416) and not off Stapleton. And it is plain that, inasmuch as the pilot of the *Ailsa* testifies, that when she went down it was so thick off Staten Island that he only saw the royals of some vessels at anchor there (fol. 230), the pilot of the *Galileo*, if he had been then anchored there, could not have seen more than the royals of any vessels going by, and could not have seen the *Ailsa* and the *Bourgogne* when they went down. But he swears he did see them when they went by. So that the *Galileo* must have been then at anchor just below Liberty Island. How long after that she went down it is not possible to tell.

(*c.*) Now, we have the statements of witnesses on the *Ailsa*, the *Bourgogne* and the *Advance* as to the weather which each of them encountered. And as the *Werra* came down between the *Ailsa* and the *Bourgogne* her weather was the same. **All** these vessels met the same kind of weather.

The allegation of the *Ailsa's* libel is as follows:

"Upon approaching the Narrows the *Ailsa* ran into a fog; after consultation * * it was deemed imprudent to continue any further, owing to the increasing density of the fog" (fols. 15, 16).

The evidence of the navigators of these vessels is as follows:

SHOOK, pilot of the *Ailsa* (fol. 227):

Weather when we started was thick and rainy. Rainy and misty.

(fol. 228):

Ran into fog just below Bay Ridge. Fog was thickest on Staten Island shore. (fol. 230) Couldn't see anything above it but a few ships lying there. I saw the royal yards. We slowed down when we got into the fog. (fol. 231) Stopped engines after we passed Fort Lafayette, anchored below.

CAPT. MORRIS, of the *Ailsa* (fol. 420):

We first perceived the fog when we were down to the Narrows.

(fol. 421):

Fog thicker on the starboard side on Staten Island shore.

(fol. 423):

Ran into very thick fog almost immediately after passing Fort Lafayette—in two or three minutes.

(fols. 471–2):

Slowed when we got into the fog before we struck the Narrows—about half a mile above. I didn't see the Quarantine Station; wasn't looking at it.

COTE, mate of the *Ailsa* (fol. 544):

We ran into fog just at the beginning of the Narrows:

(fols. 545–6):

She was going slow as soon as the fog began to the northward of the entrance to the Narrows; about the north end of Staten Island, the ferry landing at St. George.

CAPT. BEERS, of the *Advance* (fols. 1156–7):

Encountered fog about off Robbins Reef. Between Robbins Reef and Staten Island went into a regular thick fog bank. Slowed down and then stopped. Ran down till we got below Fort Lafayette, and anchored.

WATSON, pilot of the *Advance* (fol. 1646):

As we went down it was thick and raining. * * * We made the Bell Buoy on the Mud Flats. The Long Island Shore was all in sight. On the Staten Island shore we couldn't see anything.

(fol. 1677):

Could not see the ferry at St. George. Saw Robbins Reef light.

POIROT, Captain of the *Bourgogne* (fol. 1215):

When we left the wharf the weather was quite clear. We saw sufficiently well to navigate, and up to Robbins Reef the weather remained sufficiently clear. We had good sight.

Q. How was the weather after passing Robbins Reef?

A. The weather got foggy quite fast, more foggy than it had been. When we got down about to Quarantine it became very thick, especially on the Staten Island side.

Q. Was the fog any lighter on the Long Island side?

A. It was.

A. H. MURPHY, pilot of the *Bourgogne* (fol. 1442):

The weather, as we started, was rainy and hazy.

(fol. 1443):

Q. How was the weather when you got down by Robbins Reef?

A. On the west shore it was all foggy, on the east shore it was clear.

(fols. 1445–8):

Q. As you went down below Robbins Reef, what was the appearance of the view down the Narrows?

A. You could see from the Buoy on the Mud Flats, you could see the red houses on the dock just above Fort Lafayette on the Long Island side; on the other side it was all shut in, that is from mid channel to the westward.

Q. Could you see vessels at Quarantine?

A. No, sir

Q. As you went down towards Fort Lafayette was there any change in the weather?

A. As we got near to it it commenced to get thicker. When we got down abreast of this dock just above

Fort Lafayette, it commenced to shut down on us there, and we reduced speed and kept our whistle blowing.

Q. Was that reduction of your speed when you were above Quarantine or below?

A. Above; just above it

Q. How did the weather continue from that time?

A. As we was going down it got a little thicker with us, and finally when we got down below this dock above the Fort, it did shut down thicker.

Q. Where did you slow first?

A. Above Quarantine.

Q. How far below Quarantine had you got when it shut down thick?

A. About half way between Quarantine and the Fort, I should judge; Fort Tompkins.

(*d.*) This evidence of these witnesses shows that each of the vessels, as she went down the Bay, met a gradually thickening fog, thicker on the Staten Island shore, and thinner on the Long Island shore, and becoming very thick about Fort Lafayette.

And the question being a question of prudent navigation, the fact that these four vessels pursued the same navigation, followed afterwards in it by the *Seneca* and the Hamburg steamer, is sufficient to show that it was no fault in the *Bourgogne* that she sought anchorage ground in Gravesend Bay, and that for this purpose she went on after she met the fog, just as all the other vessels, including the *Ailsa*, had done. The Court will not undertake to say that the course of navigation which the pilots of six vessels pursued on that day was a faulty one.

(*e.*) If we consider the case, leaving entirely out of view the Treasury Regulations which forbade the *Bourgogne* to anchor in the channel, the question is one of prudent management. Was it prudent or was it negligent in the pilot of the *Bourgogne* to take the same course of navigation which five other pilots took under the same circumstances? The very definition of negligence shows that it was not negligent for him to do so. For "negligence is the failure to do what a reasonable and prudent person would ordinarily have

done under the circumstances of the situation." (Railroad Co. *v.* Jones, 95 U. S., 441.)

Here were five persons all ordinarily reasonable and prudent persons, all of whom pursued the same course. The pilot of the *Bourgogne* can not be singled out as being negligent.

The counsel for the *Ailsa* refers to the cases which hold a vessel negligent for not going at a moderate speed in a fog. But that is the case of a violation of an express statutory requirement.

The statute commands a vessel to go "at a moderate speed in a fog." There is no statute which commands a vessel not to proceed at all in a fog, but to anchor at once.

The command to "go at a moderate speed" is in fact inconsistent with a command not to go at all. Whether to anchor or not on that day was a question not of statutory regulation but of prudent management; and as to that the actions of the five pilots, including the *Ailsa's* pilot, speak louder than the words of the *Ailsa's* counsel.

The effect of the Treasury Regulations will be considered further on.

(*f.*) Counsel for the *Ailsa* suggests (Brief, p. 10) that there was a difference of opinion between Capt. Poirot and the pilot of the *Bourgogne* as to anchoring, as if Capt. Poirot wished to anchor at once, instead of keeping on through the Narrows.

But this is a strained construction of Capt. Poirot's evidence, which was as follows:

(fol. 1219):

"As soon as I saw that the fog got very thick, I told the pilot I wanted to anchor. The pilot called my attention to the fact that we were too much engaged in the Narrows, and that we were right in the middle of the Channel, and that we must go and anchor to the south of Fort Lafayette in Gravesend Bay; that using the bell on Fort Lafayette as a guide, we could go and anchor there. And that is what we did."

Murphy's evidence is as follows (fol. 1448):

"The captain spoke to me about anchoring at Quarantine. I told him it was not prudent to go in there. It would be better for us to go down to Gravesend Bay and anchor in a safe place, and he said, 'All right.'"

Here is no proof of any difference of judgment between Captain Poirot and the pilot. But, if there were, the pilot's judgment was correct. Anchoring on the Staten Island side between Fort Tompkins Light and Quarantine is forbidden except for vessels "detained at upper Quarantine." And, as between the prudence of turning the *Bourgogne* round in the fog and going back up to abreast of Stapleton, and the prudence of going on to Gravesend Bay, there can be no dispute that the course pursued wasthe best.

See Murphy, fols. 1505-1508; 1521-2.

The argument of the Opinion of the District Judge on this point is unanswerable (fols. 1859 to 1864).

(*g.*) The *Ailsa's* counsel is under a misapprehension as to the position of the *Bourgogne* when the question of anchoring arose between the Captain and the pilot. His brief states on page 3, that it was "as they *approached* Quarantine," and on page 10 he states that it was "*above* Quarantine, about midchannel, 3,750 feet from Fort Lafayette." Whereas it was, as both the Captain and pilot of the *Bourgogne* testify, *below* Quarantine. The counsel's brief at page 10 says that "Judge Brown's remark (p. 319, fol. 1273) that the spot marked was about a quarter of a mile below Quarantine, was certainly an inadvertence."

Plainly enough there is an inadvertence, but it is on the part of the counsel for the *Ailsa*, not on the part of Judge Brown. Counsel for the *Ailsa* has inadvertently treated the line of the two sheets of the chart, pasted together (on which he himself said (fol. 1272) that the witness made the mark), as being at right angles with the channel, which it is not. Judge Brown drew the line, as it should be drawn, at right angles to the chan-

nel from the wharf at Quarantine, and the point marked by Capt. Poirot on the chart is exactly as Judge Brown said, "about a quarter of a mile below Quarantine."

(*h.*) The situation, then, of the captain and pilot of the *Bourgogne* was this: They had passed Quarantine a quarter of a mile or so, when they found that the fog was so thick as to make it wise to anchor. There were four courses possible: (1st) to anchor in mid-channel, where they were; (2d) to anchor below Quarantine on the Staten Island side; (3d) to turn around and go up stream and anchor somewhere in the upper bay; and (4th) to proceed to the Gravesend Bay Anchorage.

But the first course, viz, anchoring in the channel, was forbidden by the Treasury Regulations. And so was the second. The Treasury circular of July 5, 1889, issuing the Regulations, begins by saying: "The regulations relating to the anchorage of vessels in the Port of New York, made this day, will be strictly observed, and all officers of revenue vessels at the Port of New York are hereby empowered and directed in cases of necessity or when a proper notice has been disregarded, to use the force at their command to remove *from the channel ways* any vessel found *violating* the Rules."

The *Ailsa's* counsel seems to claim to have special knowledge of the purpose of the Regulations, for he says: that they are meant to "point out where vessels may lie for weeks." Having no such special knowledge ourselves, it seems to us that the Secretary of the Treasury must be presumed to have meant just what his words said: that providing where vessels "may anchor" means that they may not anchor elsewhere; and that the provision that vessels "shall not anchor" in a certain part of the river is not repealed by the existence of a fog, or the absence of signals.

Counsel for the *Ailsa* can hardly be serious in suggesting that the words of the Regulations "detained at upper Quarantine" include the *Bourgogne*, because

she ought to have been detained by fog. The vessels excepted from that regulation are not outward-bound but inward-bound vessels which are "detained" by the Quarantine authorities.

"Detained" is a very familiar word in the Quarantine Laws, used in reference to the action of the Health Authorities.

"Shall not be detained."

N. Y. Stat. of 1863, Chap. 358, § 9.

"Shall be detained."

Id., § 15.

As to the third measure to be taken the evidence of the pilot (fols. 1505–6) and captain (fol. 1277), as to its unwisdom must commend itself to anyone. It is left entirely uncontradicted. And in fact it is not claimed by the appellant's counsel that she should have taken that course.

(*i.*) The ground is boldly taken by the appellant's counsel that the *Bourgogne* was in fault in not having anchored "before she reached the fog." (*Ailsa's* brief, p. 10.)

But there is absolutely no rule of law or requirement of prudent navigation calling for any such thing. The cases all hold (including the cases cited by the *Ailsa's* counsel) that it is only when *in* a fog that a vessel may, if necessary, be required to anchor. The regulations require every vessel "*in* a fog" to go at a moderate speed, and in the case of *The Saale* (63 F. R., 478) it was held that a vessel must reduce her speed as soon as she enters a fog bank. We challenged counsel in the court below to cite a single case holding that a vessel must anchor *before entering* a fog. None was cited there and none is cited here. In the case of *The Blue Bell*, it was said that "in a dense fog it is the duty of a steam vessel to anchor *as soon as circumstances will permit.*" This is exactly what the *Bourgogne* did. She did not encounter the dense fog until after she reached a point in the river below Quarantine;

and then the only proper anchorage which "circumstances permitted," was just the place which she selected and attempted to reach.

The regulation requiring the *Bourgogne* to anchor east of the line marked out by the Treasury Regulations was a most important "circumstance;" and that did not "permit" the *Bourgogne* to anchor in the channel or permit the *Ailsa* to anchor where she did. We need not discuss the question whether a vessel would be justified, notwithstanding the regulation, in anchoring elsewhere than on anchorage ground "in an emergency;" for it is manifest that there was no emergency.

There would have been no difficulty with the soundings and the bell on Fort Lafayette, in the *Ailsa's* putting herself on anchorage ground. The *Bourgogne's* navigators recognized that there was no difficulty in doing so. "The pilot said that using the bell on Fort Lafayette as a guide we could go and anchor in Gravesend Bay" (Poirot, fol. 1219). When she had the bell on Fort Lafayette West of North from her she would know that she was on anchorage ground; and the soundings would prevent her from any danger of running aground in going thither.

None of the other steamers that went down that day considered that there was any "emergency" which called upon them to anchor in the channel. And even the *Ailsa* herself did not consider that the fog was "emergency" enough to call upon her to anchor *at once*, for she ran into the fog "on *approaching* the Narrows," and did not anchor until she was half a mile or more below Fort Lafayette.

(*j.*) The *Ailsa's* counsel says (Brief, p. 13): "Counsel for the *Bourgogne* was challenged in the Court below to give a good reason for not anchoring off Bay Ridge. He gave none there. It is believed he can give none here."

We gave the following reason in the Court below, and we repeat it here. As to its *goodness*, the Court must judge:

"The reason for the *Bourgogne's* not anchoring off Bay Ridge is manifest. The atmosphere at that time was such that the pilot and master of the *Bourgogne* could see nearly two miles. There was no reason whatever, therefore, for anchoring. They could not tell then but what, when they arrived at Fort Lafayette, the atmosphere would still be such that they could see two miles further. And no steamer could be required to anchor at a time when she could see two miles ahead."

No case has been cited and no case can be found holding that a vessel whose navigators can see two miles is required to anchor because the fog is thicker around her than it has been, or because there is a prospect that the fog may become thicker as she goes on. It is not until the fog becomes so thick as to make navigation dangerous that the question arises on a vessel whether it is her duty to anchor. That question did not arise in this case until the *Bourgogne* was below Quarantine. And her navigators at once determined to anchor and at once determined to go to the nearest and best place for that purpose.

We repeat that, when the ship was off the buoy on the Mud Flats, which is below Robbins Reef, while the weather was thick on the Staten Island side, the pilot could see on the Long Island side down to the red house on the dock just above Fort Lafayette (Murphy, fol. 1445) which is more than two miles below.

He could not tell then but that when the *Bourgogne* should reach Fort Lafayette he would still be able to see two miles ahead. He was, therefore, perfectly justified in keeping on till the fog became so thick as to interfere with the further progress of the vessel. When that time arrived she was below Quarantine, and the pilot and captain then agreed upon anchoring. And being there, the going to anchorage ground in Gravesend Bay, observing all possible care in so doing, was more prudent than to anchor in the channel contrary to the law, or to turn around and go back to find anchorage above the Narrows.

The argument, that inasmuch as the pilots of the

Werra and the *Advance* and the *Seneca* and the *Hamburg* steamer, and of the *Ailsa* herself, deemed it prudent in a similar condition of the weather to go through the Narows, therefore the pilot of the *Bourgogne* was not imprudent in doing the same thing, is unanswerable.

The Court will not undertake to declare a judgment as to what was prudent navigation, contrary to the actions of six pilots, one of whom was the pilot of the *Ailsa* herself.

Moreover the views of the pilots, as shown by their actions, agreed with the view of the owners of the *Ailsa* and of their counsel, as expressed in their libel.

That libel contained the allegation "that upon approaching the Narrows the *Ailsa* ran into a fog. After consultation between the captain and the pilot it was deemed imprudent to continue any further, owing to the increasing density of the fog" and thereupon the *Ailsa* anchored where she did. Inasmuch as the allegation was also made that the *Ailsa* was entirely free from fault, the above was a statement on their part of what were the requirements of prudent navigation. Now, this language is as fitting for the case of the *Bourgogne* as for the *Ailsa*. The *Bourgogne* "upon approaching the Narrows ran into a fog" as the *Ailsa* is alleged to have done. On the *Bourgogne* there was the same consultation between the captain and the pilot, which is alleged to have occurred on the *Ailsa*. The same conclusion was arrived at on both vessels, that it was imprudent to continue. The *Ailsa* thereupon proceeded through the Narrows until she was about half a mile below Fort Lafayette, and so did the *Bourgogne*. The navigation of the two vessels thus far was identical. The difference between the two was that the *Ailsa* anchored before she reached anchorage ground, whereas the *Bourgogne* was endeavoring to reach the anchorage ground before she anchored. This action on the part of the *Ailsa*, and the allegations of her pleadings, would seem to be a sufficient answer, of itself, to all that part of the argument on behalf of the

Ailsa which seeks to charge the *Bourgogne* with fault for not anchoring above the Narrows, upon the untenable theory that a vessel is bound to anchor as soon as fog sets in, even though she is in the channel-way and not on anchorage ground.

We apprehend that that proposition of law cannot be successfully maintained, that a vessel must anchor before reaching a fog, or that she is bound to anchor instantly when fog sets in, even though she is in the channel. The language is cited by the *Ailsa's* counsel from Marsden that a vessel in such weather should bring up "on the first opportunity." It could hardly be held that that language called for the anchoring in a forbidden channelway. The case of *The Blue Bell* arose under the Thames Regulations of 1880, which seem to allow vessels to anchor in the fair way in a fog (Prob. Div., 1895, p. 242, note), and do not seem to provide anchorage grounds as our Regulations do. And the case of *The Otter*, which Justice Bruce (not Le-Jeune) cited as authority for his statement, only held that where a steamship, *whilst in a good and well known anchorage ground*, enters a dense fog, it is her duty to anchor at once. The case of *The Raleigh*, 41 F. R., 527, was a case of a collision in the Hudson River, and there was no pretense of a violation of a Regulation as to anchorage ground in the case. Furthermore the Court found that *The Raleigh* could have safely anchored at the Englewood dock. The case of *The John Adams*, 1st Clifford, was a case of a collision between a ferryboat and a vessel at a pier. The ferryboat had run into a fog while making her passage and was held in fault for proceeding at too great a speed and not having a good lookout. But there is no suggestion in the case that she ought to have come to anchor.

The case of *The Alberta*, 23 F. R., was not a question of anchorage at all. The case of *The Alva* was one where there was no regulation as to anchorage ground, and where the Court held that *The Alva* anchored where vessels were accustomed to anchor, and out of the line of the usual course of vessels;

and in the case of *The Buffalo* the Court found the same fact that the vessel was on proper anchorage ground.

It can no more be claimed that the *Bourgogne* should have anchored as soon as the fog set in thick, than it could be maintained that, if she was on the high seas, she should stop as soon as the fog set in thick. There is no such requirement of law or of prudence. The requirement is that she shall "go at moderate speed" in a fog wherever she is. And, as the Circuit Court said in the case of *The John Hopkins* (13 F. R., 188) of vessels navigating in a fog, "it is as certain that they were not required to lie to or anchor as that 'a moderate speed' does not mean *no speed at all.*"

FOURTH POINT.

The Bourgogne's speed was not excessive.

La Bourgogne is charged with fault in the libel of the Western Assurance Company in that she was running at excessive speed.

The District Judge thought she went down the Bay nearly to Fort Lafayette at nearly her full speed. We think she did not, and that it would not be difficult to show by a working out of her speed from distance, time, tide and number of revolutions that there was no excessive speed before that time. But it would be a waste of time and labor.

In the case of The *Frisia* (24 F. R., 497) a speed of 15 miles an hour in the harbor of New York was held not to be excessive.

(The case was reversed, 28 F. R., 249, but not on this ground.)

The *Bourgogne's* rate of speed as she went down the Bay is entirely immaterial. The only question of speed bearing upon the case is as to her speed at and just before the time when she discovered the *Ailsa*.

The evidence is conclusive that, at and before her seeing the *Ailsa*, there was no excessive speed. It is of several classes.

(*a.*) The tendency of witnesses to estimate the speed of a coming vessel too highly is general. And yet Capt. Morris of the *Ailsa* estimated the speed of the *Bourgogne* at two knots (fol. 436).

(*b.*) The time which elapsed between the sighting of the *Ailsa* and the collision, and the distance run in that time, show it.

1. The time was a minute or a minute and a half, by the evidence of all the witnesses who speak on the point.

About a minute and a half or two minutes. Ollivier, (fol. 1095).

A very short time after it. So to speak, no time. Clochet, (fol. 1107).

A minute—a minute and a half. Beziel, (fol. 1120).

The order to reverse was a minute and a half or two minutes before the collision. Rempler, (fol. 1608).

2. The distance at which the *Ailsa* was seen is estimated at 50 to 60 meters.

"Somewhere from 50 to 60 meters."
Lecouedic, (fol. 1020).
Hascoet, (fol. 1033).
Limpaler, fol. 1072.
Hede, fol. 1080.
Le Gall, fol. 1085.

55 or 60 metres.
Le Moine, fol. 1048.

50 or 60 yards.
Rabe, fol. 1061.

About 70 metres.
Olivier, fol. 1095.

As soon as I had given the three blasts I saw the masts about 50 metres—60 metres off.
Le Meur, fol. 1134.

About 60 metres.

Poirot, fol. 1221.
Gicquel, fol. 1359.

I don't suppose she was over 50 feet away when I saw her.

A. H. Murphy, fol. 1456.

This would make the average speed of the *Bourgogne*, during the interval between sighting the *Ailsa* and the collision, about a knot an hour, her engines working back during most of the time (having been reversed as soon as the *Ailsa* was seen), and the tide of course carrying her forward all the time.

(*c.*) Before the *Ailsa* was seen the engines of the *Bourgogne* had been stopped for several minutes, so that she was moving, when the *Ailsa* was seen, only under her reduced headway and the force of the tide. And for some time before that her speed had been reduced by repeated stoppings.

The entry in the log of the *Bourgogne* is as follows (fol. 1811):

"At 2.05 intense fog—whistled frequently; maneuvred slowly in order to take anchorage. Perceived ahead a little to port a vessel anchored; backed at full speed; nevertheless at 2.10 we collided with this ship."

The entry in the engineer's log reads as follows (fol. 1398):

"Maneuvred slowly ahead. Stopped at 2.05. Astern full speed (repeated) 2.07. Different maneuvres up to 2.22."

And the evidence is that the words "maneuvred slowly ahead" mean moving the engine slowly ahead with occasional stops (Dalido, fol. 1423).

It is probable that there was a slight difference between the engine-room clock and the wheelhouse clock.

If there were not, the reversal of the engine at 2.07

would have been three minutes before the collision at 2.10, instead of a minute and a half or two minutes, as the witnesses estimate it. But a difference in time of a minute or two between the clocks is not unnatural or uncommon.

The evidence of the witnesses on this point is as follows:

CAPT. POIROT:

"The engine stopped going, and we were going very slowly" (fol. 1219).

"I had the engine stopped. I had it started again and had it stopped again in order that the ship shouldn't go ahead too fast" (fol. 1288).

REMPLER:

"We went ahead slow. I passed the order, 'Go ahead slow' and 'Stop.' I don't recollect very well how many times we did that.

Q. Do you mean those same orders several times? A. Yes.

Q. How long before the collision was the last order to stop given? A. I don't know exactly the number of minutes, but a good little bit of time (*un bon moment*) before we stopped)—a good length of time.

Before we saw the *Ailsa* we didn't see anything at all. It was quite a little while that we had already received the order to stop. * * * When we saw the *Ailsa* the engine was already stopped and had been '*depuis un bon moment*'" (fols. 1604–7).

A. H. MURPHY:

"When we got Fort Lafayette a point abaft our beam we stopped" (fol. 1452).

"When we passed Fort Lafayette I should judge the *Bourgogne* was going about four knots." (fol. 1476.)

(*d.*) Counsel for the Western Assurance Company, on p. 10 of his brief, arguing that the *Bourgogne's* speed was excessive, says: that "the blow was a severe one." This is an entire mistake. The evidence on this point is as follows:

SHOOK (fol. 249):

It was just a crush; that was all, and the *Ailsa* she

fell over to starboard and the *Bourgogne* kind of listed over the other way.

Captain Morris describes the collision at fols. 436–7 without a suggestion of any shock.

Cote, the mate, says nothing about it.

Nelson, at fol. 653, says "She crushed into us."

Tietgens, at fols. 714–15, speaks of the collision, and at fol. 718 he says, "As soon as *I heard* the crash." He does not even speak of feeling it.

Pearce, a passenger, fol. 769, says he "felt a tremor run through the ship."

Barclay, one of the engineers, fol. 956, simply says he "felt the collision."

Murphy, the second mate, fol. 1547, says: "If I was standing on one leg it wouldn't knock me off my balance."

And Russell, at fols. 1191–92, testifies as follows:

"Q. State whether or not the collision was a violent one or otherwise? A. It was not a violent one. She came very slowly, the same as the ship was stopped.

Q. Did you hear the crash of the collision? A. Yes, I heard the crash where I was standing.

Q. Did it make much of a noise? A. No, it didn't make much, it was more of a crush, didn't make much of a noise; didn't even stagger me, and I was standing in the middle of the deck at No. 2 hatch when she struck.

Q. It has been stated in the case that the collision was so violent as to cause the *Ailsa* to careen over? A. That is a mistake, sir; she didn't do that."

This evidence put together certainly shows that the evidence of Captain Poirot, that the *Bourgogne* was almost stopped at the time of the collision, is correct. The size of the wound proves nothing. If the *Bourgogne*, with her weight, was in motion at all, it would be sufficient to crush in the thin iron plates of the *Ailsa* wherever the vessels touched.

(*e.*) Unless the untenable ground can be maintained that the *Bourgogne* was not entitled to be in motion at all she was not in fault as to her speed. That speed was governed with extreme care. It is difficult to see

what more she could have done in reference to speed, unless she had come to anchor.

FIFTH POINT.

The Bourgogne was in no fault as to her lookout or the vigilance of her officers and crew.

(*a.*) On her bridge were Capt. Poirot, her Master, and Murphy, the Pilot, Rempler, the 3d Lieutenant, at the telegraph to the engine-room, Morice and Daniel, quartermasters, on the bridge to pass orders, Le Meur, a quartermaster, at the whistle ; and Beziel, a quartermaster, at the wheel.

On her forecastle were Gicquel, her Second Captain, with two special lookouts, Rabe and Clochet, one on each side of the bow, and the boatswain, Petiot, and seven sailors.

They are proved without contradiction, to have been looking out with vigilance and attention. There is no effort to prove the contrary.

They saw the *Ailsa* as soon as she became visible.

They heard the bell before the vessels came together.

None of them heard the bell before the *Ailsa* was seen.

(*b.*) The Court cannot hold, from the mere fact that the bell was not heard earlier, that there was a lack of vigilant attention on the part of the *Bourgogne*.

It cannot be believed that the bell of the *Ailsa* was in fact heard before she was seen. To believe that one would have to believe that the sixteen witnesses from the *Bourgogne* had all committed perjury.

And it is manifest that the mere fact that the bell was not heard might have been due to either one of three causes, viz. : Either (1) the bell was not rung from the time that the *Bourgogne* came within the scope of its being heard, till after the *Bourgogne* was in sight, or

(2) the sixteen men on the forecastle and bridge of the *Bourgogne* were all of them struck with a simultaneous lack of attention, or (3) there was something in the condition of the atmosphere or the position of the bell on the *Ailsa*, which prevented its being heard.

The second of these hypotheses may be disregarded as incredible.

If the third be assumed as the cause, it discharges the *Bourgogne*, as well as the *Ailsa*, from any charge of negligence, because if the atmosphere was such as to prevent those on the *Ailsa* from hearing the whistle of the *Bourgogne*, *a fortiori* would it prevent the men on the *Bourgogne* from hearing the bell on the *Ailsa*.

There remains the first hypothesis, viz.: That by reason of carelessness on the *Ailsa*, the bell was not rung during that period.

This hypothesis we will discuss later, when we consider the faults alleged against the *Ailsa*.

It seems sufficient, as far as the *Bourgogne* is concerned, that there was no lack of vigilance on her part. No one can believe that, while sixteen men were unable to hear any bell from the *Ailsa*, a greater number would have heard one; or that all of the sixteen men were suddenly attacked by a simultaneous lack of diligence.

Their failure to hear the bell of the *Ailsa* is much more likely to have occurred by reason of her failure to ring the bell at the particular time in question, or by reason of some peculiarity of the atmosphere or the position of the bell (see Diagram), than by reason of a unanimous failure of sixteen men to give to the navigation of the ship that vigilance which they were especially set to give. In fact the witnesses to the lookout on the *Bourgogne* are so numerous that it is rather a matter of surprise that the counsel of the *Ailsa* does not find fault with the *Bourgogne* for having too many men on the lookout, as he seems inclined to find fault with her for blowing her whistle too often. (Brief, p. 42.)

And whether the fact that the bell was not heard was due to the fact that it was not rung at that partic-

ular time, or to some condition of the atmosphere which made it inaudible to all the sixteen witnesses, in either case the *Bourgogne* is equally free from fault in not hearing it.

The counsel for the appellants claim that in addition to all the lookouts forward the *Bourgogne* shonld also have had a lookout in the crow's nest, and is in fault for not having had one there, because, as their brief says (p. 20), "It is altogether probable that a lookout there might have descried the masts of the *Ailsa* in time to avoid a collision."

It is true that the masts of the *Ailsa* were seen from the *Bourgogne* before her hull was, but that was not by reason of any difference in the density of the fog. The fog was not perceptibly heavier on the water than it was at the height of the masts. "There was no appreciable difference." (Capt. Poirot, fol. 1346.) He testifies, also that the fact of his being higher gave him no advantage; that he could not see the sky overhead because it was raining; that the reason why the masts of the *Ailsa* were seen before the hull was, was because the masts were of a color that is more easily seen than that of the hull, the masts being of a reddish yellow and the hull gray (fol. 1344).

There is no evidence in the case that a man placed in the crow's nest 40 feet 8½ inches from the deck could have seen the *Ailsa* any earlier than she was seen.

The appellants' counsel only venture to claim that that is "probable." That is small ground on which to hold the *Bourgogne* in fault, in view of the positive evidence in the case, and in view of the extreme precautions which were actually taken on board of the *Bourgogne*.

The charge of lack of vigilance made against the *Bourgogne* is therefore abundantly disproved.

SIXTH POINT.

The Bourgogne's whistle was properly blown.

The complaint, not alluded to in the pleadings, and not specifically charged in the briefs, that the whistles of the *Bourgogne* were blown too often, has no other foundation than the imagination of counsel who has quoted the words "as one might say, almost continually" in the report of the master, omitting the words, "according to law, at very short intervals." The evidence as to the frequency of the blasts of the *Bourgogne* is that they were blown at intervals of less than a minute, varying from twenty to forty seconds.

Capt. Poirot says the whistle was blown probably every twenty seconds, perhaps oftener (fol. 1252). He explains (fol. 1619) what he meant by "presque continuellement," and adds: "It is perfectly evident that I didn't have that whistle blown in such a manner that I couldn't hear what was going on."

Le Meur, who blew the whistle (fol. 1130) says: "The commandant gave me orders to whistle every thirty or forty seconds, and I did so."

The estimates of the other witnesses agree with this.

It seems to us that it is a very violent assumption to claim that the bell of the *Ailsa* was not heard because the whistle of the *Bourgogne* was blown too often. It might about as well be claimed that the whistles of the *Bourgogne* were not heard on the *Ailsa* because the bell of the *Ailsa* was rung too often.

The witnesses from the *Ailsa* use the same word "continually" which Capt. Poirot used in his report. (Morris, fol. 435; Tietjens, fol. 726).

SEVENTH POINT.

There is no presumption of fault against the "Bourgogne," because she went on and anchored after the collision.

Counsel for the *Ailsa* claims that there is a presumption against the *Bourgogne* from the fact that, as he says, she "backed away from the sinking vessel, rendered her no assistance, and left her to her fate." He refers to the statute (26 Stats. at L., p. 425) which he says "formulates a reasonable rule of law which the Courts recognized before the statute." The words of the statute are that "In every case of collision between two vessels it shall be the duty of the master or person in charge of each vessel to stay by the other vessel until he has ascertained that there is no need of further assistance, and to render to the other vessel, her master, crew and passengers, such assistance as may be practicable, and as may be necessary, in order to save them from any danger caused by the collision." Capt. Poirot maneuvred his vessel so as, while avoiding a second collision, to keep her in about the same place (fol. 1226) and he anchored the *Bourgogne* within half a mile of the place of collision. It seems to us idle to claim that a vessel does not "stay by" another which under such circumstances anchors within half a mile of her.

As to any assistance that the *Bourgogne* could have rendered, there is no suggestion that any assistance whatever was practicable. Nor was it. The *Ailsa* was ashore, as it is claimed by the *Ailsa's* counsel, before the *Bourgogne* came to anchor. As soon as the *Bourgogne* did come to anchor her boats were put out in readiness to render assistance, if any should be practicable. But, as above stated, no assistance was practicable. The counsel for the *Ailsa* cites three cases, the *Atlas*, the *America* and the *Adriatic*. A glance at those cases will show that there is not the slightest parallel between them and the present case. Capt. Poirot's first duty was to bring his vessel to a safe

anchorage. If ever there was a violent presumption it would be a presumption that the pilot of the *Bourgogne* was desiring to get away in secrecy or had any idea that it never would be known that the *Bourgogne* had been in collision with the *Ailsa*, or that any presumption of fault is to be drawn from the action of the *Bourgogne* in coming to anchor.

EIGHTH POINT.

The Bourgogne was free from fault in every particular.

We find, then, that the navigation of the *Bourgogne* was as follows:

She had an abundance of men on the lookout. She had competent and skillful navigators on her bridge. The weather was rainy when she started. As she went down the Bay it was found that there was a fog below, the fog being thicker on the Staten Island than on the Long Island side of the channel, so that the shore of Long Island was visible for a considerable distance.

As she went into the fog her engines were slowed and stopped. The fog thickening after she passed Quarantine, the master and pilot determined to anchor, and thereupon determined to seek the anchorage of Gravesend Bay for that purpose, taking the same course of action which was pursued under similar circumstances by the *Werra*, the *Advance*, the *Seneca*, the Hamburg steamer, and by the *Ailsa* herself, and presumably by the five or six other vessels which were anchored in Gravesend Bay to the southward and eastward of the *Werra*, all of which had gone down before.

Her engine was stopped, and from that time she proceeded at as low a rate of speed as was consistent with keeping her under adequate control, her engines being alternately stopped and started ahead slow for that purpose. At the time when the *Ailsa* was seen,

her engines had been motionless for about two minutes.

While so navigating, and before she had reached the anchorage ground, she sighted the *Ailsa*, which was at anchor so far out in the channel that all the other vessels which are known to have gone down the Bay after her went to the eastward of the place where she was anchored. The bell of the *Ailsa* was not heard, either because it was not rung, or because of some peculiar condition of the foggy atmosphere, until after the *Ailsa* was seen. And as soon as she was seen at the distance of 150 or 200 feet she was reported and the engines of the *Bourgogne* were at once reversed, her speed being at that time already so low that it took a minute and a half after the *Ailsa* was seen before the vessels came together.

It is not possible to charge the officers of the *Bourgogne* with negligence or with the failure of any duty. The collision with the *Ailsa* was not to be avoided by any care or vigilance on their part. The master of the *Bourgogne* was obeying the law in seeking to anchor out of the channel; and in reaching such an anchorage his vessel was navigated with all possible care and skill. The accident, so far as the *Bourgogne* was concerned, was one which could not be avoided. And the *Bourgogne* is entitled to be discharged from this suit on the ground that no fault is established against her.

NINTH POINT.

The Ailsa was anchored in an improper place in violation of law.

If we come to consider the faults of the *Ailsa*, our first claim is, that she was anchored where she was forbidden to anchor by the Treasury Regulations; that is, that she was anchored west of the line running from Buoy 18 through the east side of Fort Lafayette

to the East channel between buoys 2 and 4. In fact, we claim that she was anchored about midchannel.

(*a.*) The first statement, as to her place of anchorage, that appears in the case, was the one made by her pilot, Shooks, in his report to the Pilot Commissioners (fol. 324), in which he stated that the *Ailsa* was at anchor "off Gravesend Bay" at the time of the collision. He did not say that she was at anchor *in* Gravesend Bay, but *off* Gravesend Bay.

The next statement made, as to the anchorage of the *Ailsa*, was in her libel, in which it was alleged that the *Ailsa* "left the midchannel" and was anchored "as close to the Fort Hamilton shore as was deemed prudent in order to be out of the way of vessels proceeding through the Narrows" (fol. 16).

> The absence from that libel of any allegation that the *Ailsa* was anchored on anchorage ground or outside of the channel prescribed by the Treasury Regulations, is in entire accordance with the statement of the pilot above named, and with our claim that the *Ailsa* was anchored in the channel.

The next statement, as to the anchorage of the *Ailsa*, appears in the answer of the owners of the *Ailsa*, in which still there is no allegation that the *Ailsa* was anchored out of the channel, although the libel of the owners of the *Bourgogne* against her had explicitly charged, as one of the faults claimed against her, that she was anchored in the channel, in violation of the regulations. Nevertheless, the owners of the *Ailsa* confined themselves in their answer to the allegation that she was lying at anchor "at a point considerably to the eastward of the customary path of vessels going through the Narrows and was anchored in a perfectly proper and safe place." And they made the further allegation that "the place of anchorage chosen was, in the judgment of the master and pilot of said *Ailsa*, the safest and best place for an anchorage, having in view the depth of the water, the liability of collision

with passing vessels, and the danger owing to the sudden shutting in of the fog of continuing under way much longer."

This allegation in the answer of the *Ailsa* must be taken to be the final claim of her owners, as to the place of her anchorage.

(*b.*) The District Judge found that the *Ailsa* was not anchored on the anchorage ground prescribed by the Treasury regulations. His opinion is so full and so forcible as to this fact that we do not think it necessary to trouble the Court in this brief by going over again the ground which he has covered. But, referring to his opinion (fols. 1824–1848) we will only answer some of the criticisms which are made by counsel of the appellants upon that opinion.

(*c.*) The counsel for the Western Assurance Company claims in his brief to have pointed out material errors of fact and errors of computation in the opinion of the District Judge, which should invalidate his conclusion.

(1.) The counsel says: "There is no intimation in the proofs" that the distance at which the *Ailsa* passed Fort Lafayette may have been more than 100 yards. This is an error. The libel of the *Ailsa* alleges that, *after a consultation* between the captain and the pilot, they deemed it prudent to continue no further, owing to the increasing density of the fog, and that the ship "*thereupon* left the midchannel." This is clearly an allegation that up to the time when the pilot and captain determined to anchor, the *Ailsa* was about midchannel.

Now, Captain Morris testifies (fols. 423–4) that this decision to anchor was "after passing Fort Lafayette, I may say about two or three minutes." And in answer to the libellant's counsel, at fol. 427, he repeated that evidence.

> "Q. How soon after you passed Fort Lafayette did you decide to anchor? A. It must have been about two or three minutes."

It follows from this evidence, therefore, that the *Ailsa* passed Fort Lafayette in midchannel.

Again, the pilot of the *Ailsa* testifies that when they passed Fort Lafayette the *Ailsa* was steering "South by East, as near as I can make it out."

(fols. 307 and 309):

"We kept that course until we stopped, until the engines were stopped altogether"

And therefore at the time the *Ailsa* passed the fort, no change had been made in the course which she had kept above Fort Lafayette.

Furthermore, the pilot testified (fol. 231) that he could "just see the loom of Fort Lafayette as we passed it," while the captain testified that he could "faintly see Staten Island, that is Fort Tompkins" (fols. 421–2). And Cote, the mate, says he could not see Fort Lafayette at all, though he heard the bell from it (fol. 576), and says that before they swung to their anchor the bell from Fort Lafayette was *not astern, but on the port quarter* (fol. 579). This evidence concurs with the allegation of the libel to prove that instead of passing within 100 yards of Fort Lafayette, the *Ailsa* was about in the middle of the channel, which is there 4,000 feet wide.

We maintain that the District Judge, in saying that the *Ailsa* passed Fort Lafayette, "as her officers estimate, only 100 yards to the westward of the fort, though the distance may have been more than that," made a finding very much more favorable to the *Ailsa* than the testimony warranted.

(2.) The counsel says that "the Judge was in error in assuming that the *Ailsa* was running for any time on a south-southwest course." But the words of the District Judge's opinion are, "How long or far the *Ailsa* had been running on a course of south-southwest magnetic, it is impossible to determine." The District Judge took the statement of Shook, the pilot, and has fairly reported it in that part of his opinion (fols. 1827–1830).

(3.) Counsel argues that the "District Judge was in error in throwing in half a point of deviation against the *Ailsa*," and holding her course to have been S. ½ E., because, he says, Capt. Morris testifies that "in testifying to courses he referred to corrected courses" (fol. 534). So Morris did, but he gave the true course of the *Ailsa* as south ½ east (fol. 425); so that the District Judge was entirely correct.

(4.) He says, "The District Judge is in error in assuming that the engines of the *Ailsa* were not stopped until three or four minutes after passing Fort Lafayette," because Morris testified at fol. 485 that he determined to anchor "one or two minutes after passing the fort." But he overlooks that Morris at fol. 427 says that when he determined to anchor it must have been "two or three minutes after he passed Fort Lafayette."

> And Shook at folio 315 was asked, "How many minutes did you go after passing Fort Lafayette before you stopped the engine for the first time? A. Only a few minutes, three or four minutes, or three minutes. It could not have been any more than three minutes or four minutes."

The District Judge, therefore, was entirely correct in stating that the engines of the *Ailsa* were not stopped until three or four minutes after passing Fort Lafayette.

(5.) Counsel says that the District Judge "fell into error in reference to the bearing of the bell on Fort Lafayette from the *Ailsa*, by taking no account of the deviation of the compass." But Capt. Morris testified (fol. 431) that the *Ailsa*, when at anchor, lay with her bow about north by west, or northwest with the ebb tide, And at folio 493 he repeats that she lay about north by west or north by west ½ west. And these were meant as being the correct courses, as counsel for the Assurance Company has pointed out (Morris, fol. 534). This heading agrees with the heading of the vessel, as given by the pilot. And the pilot testifies (fol. 282) that on

that heading the bell of Fort Lafayette was about two points on his starboard bow. Hence there was no error in the opinion of the District Judge on this point. The remark of counsel that "If the deviation of the *Ailsa's* compass on northerly courses was the same as on southerly courses, the bearing of the bell would indicate that the *Ailsa* was within the anchorage limits," is very extraordinary. By no possibility could she have been within the anchorage limits if the bell bore north by east, or even north from the *Ailsa*.

(6.) The counsel says that the District Judge did not refer to the fact that, (as he says,) "any point south southwest from Fort Hamilton, and not more than half a mile south of Fort Lafayette would be within the anchorage grounds." Truly the District Judge did not refer to it, because the fact is otherwise. A point half a mile below Fort Lafayette south southwest from Fort Hamilton would be 250 yards outside the anchorage grounds.

(*d.*) The counsel for the *Ailsa* presents in his brief (pp. 27–34) some considerations which, as he claims, show that the *Ailsa* was anchored on anchorage ground.

(1.) He says that the *Ailsa's* movements show that the *Ailsa* passed not over 300 feet from Fort Lafayette and he says that the courses which he gives would have brought her on anchorage ground. But, in the first place, the evidence, as we have shown, is very strong that the *Ailsa* did not pass within 300 feet of Fort Lafayette. And, in the next place, if she did, running on the courses which her pilot gave would not bring her on anchorage ground, as the District Judge shows.

(2.) He claims that the pilot of the *Ailsa* was of the opinion that she was on anchorage ground. But her pilot would not testify that that was his opinion. All he would say was that "We were on the eastern side of the channel. I cannot exactly state whether we were on the inside of the line, or on the line, because there

was a dense fog; but we were somewhere on the line, or near the line."

How could the pilot give an opinion as to which side of the anchorage line he anchored, when he was compelled to concede that he did not know the direction of the line below Fort Lafayette? He said (fol. 321) that the line was drawn "outside of Fort Lafayette," which it is not. It is drawn from the east side of Fort Lafayette. And he did not know where it ran below (fol. 323).

(3.) He says that Cooley of the *Harold*, at fol. 358, says he thought she was pretty well over to the eastward. But he does not refer to Cooley's evidence at folio 346. "She got under way, started to go *across the channel to make Gravesend Bay if she could.*"

(4.) He says, "the depth of water shows it, and that this is fixed definitely."

And he claims a depth of water of only about 48 feet. But the weight of evidence is manifestly that the depth of water was over 66 feet, a depth not to be found on any part of the anchorage ground. Capt. Morris testifies that when the anchor touched bottom the 15 fathom shackle was on deck, and that the distance from the windlass to the water's edge was about three or four fathoms, "having 10 or 11 fathoms under water" (fol. 430). Cote, the mate, gave the same evidence (fol. 549). This is claimed to be overborne by the evidence of Thompson, the Dock Superintendent, who said that he had measured on the plan the distance from the windlass to the hawse hole and from there to the water, assuming the draft to be 20 ft., and that the distance was about 7 fathoms. No such distance can be arrived at by a measurement of the plan. The windlass was on the main deck (fol. 532), and no distance of over 20 feet can be measured on the plan from the windlass to the water's edge, if the vessel drew 20 feet of water. And, deducting 20 feet, or even 24 feet from the 15 fathoms, would give a depth of water of 11 fathoms or 66 feet, which is the depth of water testified to by Capt. Morris at folio 430.

(5.) He says that the movements of the *Bourgogne* indicate that the *Ailsa* was on the east side of the channel. But this is a great mistake. Capt. Poirot testifies that when the fog became thick the *Bourgogne* was abont in the middle of the channel to go through the Narrows, heading south 11° east (fol. 1217). And at fols. 1253–1263 he testifies to the same effect at greater length. Now there is no question on the evidence but that the heading of the *Bourgogne* had not been materially changed from that time until the collision. Hence if we take a point about midchannel at the Narrows and draw a line from it south 11° east, that line will pass through or very near to the place of collision; and it is far away from the east side of the channel.

(6.) As to the movements of the *Ailsa* after the collision, the language of the District Judge is that "Almost any estimate of the time and distance traversed can find some support in the evidence." Counsel for the *Ailsa* has selected evidence which declares that the distance was short. A reference to the following folios will furnish abundant evidence to show that it was long.

Shooks' report stated the time as fifteen minutes (fol. 325). And see Cote, fols. 563 and 566; Nelson, fol. 663.

The *Ailsa's* full speed was 10 to 12 miles an hour. If she got even three minutes of full speed she would have run half a mile before she sank. The counsel, at page 32, says that "The brevity of the time after the collision is best expressed by Capt. Cooley of the *Harold*, that he didn't have time to take anybody on board before she sank."

But this is not a correct statement of Capt. Cooley's testimony. Capt. Cooley says that he did not have time to take anybody on board "*when the vessel grounded*," and he had to cast off the line to protect his own crew and boat. But even Cooley says that the *Ailsa* "after she started to go across the channel (fol. 346) sailed about, I guess, three or four minutes,

probably less than that, before she was stopped by the ship ahead"; and that from the time of his being hailed, which was some time after the collision, till the *Ailsa* ran aground could not be over eight or ten minutes at the most.

(7.) The counsel says that "one or two witnesses are of the opinion that the *Ailsa's* head was at the northeast when she struck." The "one or two witnesses" of whom he speaks are: Shooks, the pilot, who says that when the *Advance* was right ahead of the *Ailsa* she bore about northeast from him (fol. 257), (so that the *Ailsa* had then been running long enough to change her course from north by west to northeast, in conformity to the pilot's order), and Morris, who says that at the time when she settled down forward she was going northeast (fol. 441). There is no evidence whatever of any other heading of the *Ailsa* when she sank. It is utterly incredible that the *Ailsa* could have made the change of heading of five points in making the little northing and easting which is described on the chart attached to the counsel's brief.

(*e.*) One further consideration may be added to the many matters set forth in the opinion of the District Court to sustain the conclusion that the *Ailsa* was not anchored on anchorage ground.

The *Ailsa* as she lay at anchor headed N. by W.

The *Bourgogne*, as she passed Fort Lafayette headed S. by E. which is the opposite course. And she was then about in midchannel.

Now, if the *Ailsa* was not about in midchannel, but on anchorage ground or even on the eastern side of the channel, the *Bourgogne* could not have reached her without having changed her own course and gone over to eastward; and the angle of the heading of the two vessels at the collision would be the angle of that change of course.

But whatever change to eastward the *Bourgogne* had made under her ported helm had been offset by

her change to westward under her starboarded helm (her starboard helm turned her head to starboard), for when she struck she was on the same heading of S. by E. and the vessels struck stem on.

This is the testimony of Ericson, the diver, called by the libellants, who went down to examine the wound in the bow of the *Ailsa*, and who testifies positively to this effect. (Folio 1774): "My judgment was, the direction of the collision was from stem to stem." (Fol. 1775): "My judgment is that the collision took place head on." (Fol. 1776): "That is my opinion yet. My opinion is that it was head on, and I adhere to that view about it." (Fol. 1784): "Q. When you say that the blow was head on, do you mean by that exactly head on, or to either side from head on. A. I mean both vessels came together as near as they could right stem on to each other." (See Shooks, fols. 246–7.)

The line on the diagram which is marked "Angle of Collision" was put on, as it appears, by the draftsman, Reussner, who made it according to somebody's direction, and testified that it is "mere imagination." (Fol. 1765.)

(*f*.) Some further considerations may be added. The *Werra*, which came down shortly after the *Ailsa* anchored, went to the eastward of the *Ailsa*. The *Bourgogne*, which came next, came in collision with the *Ailsa*. The *Advance*, which followed shortly after, also went to the eastward of the *Ailsa*. The *Seneca* and the Hamburg steamer which came afterwards, also anchored further east than the *Ailsa*. The six or seven other vessels which were anchored at various places from the position of the *Advance* to that of the *Campania*, more than a mile below, were all to the southward and eastward of the anchorage of the *Werra*, and therefore still farther to south and east of where the *Ailsa* anchored. And no vessel is claimed to have gone down to the westward of the *Ailsa*, except one which Shook testifies passed down close to the port side of the *Ailsa*, and anchored on her port quarter,

although, when the fog cleared up, no such vessel was found in that locality at all. All these facts taken together, are sufficient to demonstrate that the claim of the owners of the *Ailsa* that she was anchored "considerably to the eastward of the customary path of vessels," is not sustained, but that on the contrary, she was anchored right in the path of vessels.

Whether this place of anchorage was, as is alleged in the answer of the *Ailsa*, a "safe and prudent one," or whether it was an anchorage in the channel, to be excused by reason of the emergency of the case, are questions which also can be disposed of by a few simple considerations.

The fact that all these other vessels, which may be presumed to have been navigated by careful navigators, anchored farther to the eastward than the *Ailsa* did, may be well deemed to show their judgment that an anchorage farther eastward was the more prudent; and this Court may well follow, as the District Court did, the judgment of these navigators.

The *Ailsa* drew twenty feet depth of water (Morris, fol. 473), whereas the *Bourgogne* drew 27½ feet (fol. 1697). The *Werra* presumably as much as the *Bourgogne*. The *Advance* drew 17½ feet, and anchored far to the eastward of the *Ailsa's* anchorage, and yet was in eight or ten fathoms of water (fols. 1659, 1695). There was, therefore, nothing whatever to prevent the *Ailsa* from going farther to the eastward and anchoring out of the channel, unless the claim of the pilot of the *Ailsa* is to be believed, that he anchored where he did, because he heard the bells of other vessels lying at anchor to the eastward and southward of him, and so near that he did not dare to go farther. But that story cannot be true. The *Werra*, which passed the *Ailsa* as she lay at anchor, anchored at least half a mile below and to the eastward of the *Ailsa;* and when the fog cleared up an hour or two afterwards, there were no vessels found nearer the place where the *Ailsa* anchored than the *Werra*. It is perfectly plain, therefore, that the *Ailsa*, instead of anchoring where she did, might have kept on to the eastward and southward for more

than half a mile before she could have approached any of the vessels that were actually at anchor when she came down. It was the duty of the pilot of the *Ailsa*, when the fog came down, to take her out of the channel upon anchorage ground before anchoring. If he had done so this collision with the *Bourgogne* would not have happened. And that he could prudently have done so is demonstrated by the above facts, which cannot be disputed.

No satisfactory reason is given by the pilot of the *Ailsa* for anchoring when and where he did. He says (fols. 232-5) that when he anchored "we could hear signals pretty much all around us in fact, south of us. There was whistles and bells. All we heard on the port bow, we heard a whistle on the port bow" (but he corrects this at once, and says it was on the starboard bow; and see fols. 261–2); and he adds: "I heard a whistle and bells. I could not say plainly where I heard them. I heard so many bells ahead of us, and whistles, that we immediately came to anchor; we was afraid to go further."

Now, the fact that no vessel was at anchor on his port bow at the time, and that the *Werra*, which came down after him, as Shook himself testified (fol. 282), found anchorage a long distance to the southward and eastward, with no other vessels near her, proves that the pilot's evidence on this point is not correct, and that the excuse which he seeks to give for anchoring at that spot did not exist.

Capt. Morris gives no such excuse for anchoring there. He says that after he anchored he heard bells on the port side of the *Ailsa* and astern (fol. 443). But no vessels appeared there when the fog cleared up.

The position of the *Bourgogne* at anchor was carefully fixed by Capt. Poirot the next morning (fol. 1244), and he gives the position of the *Werra* as about abreast of him, and about 300 or 350 metres to the eastward. And all the witnesses who speak on that point agree with him. He also states, to the best of his judgment, the position of the other vessels at anchor. And there

is no contradictory evidence. (See his diagram at p. 312.)

All this shows, as we have already said, that the excuse set up by the *Ailsa* that she was compelled to anchor where she did, by the near presence of other vessels at anchor, is not founded in fact.

TENTH POINT.

The Ailsa had no lookout and was shorthanded.

Another fault on the part of the *Ailsa* was that she had no lookout forward, as is the undisputed fact.

The *Ailsa* was also shorthanded, and had not a sufficient watch on deck.

This is a grave fault.

> The *Clara*, 102 U. S., 200.
> O'Neil *v.* Sears, 2 Sprague, 52.

The allegation of both her libel and her answer is that she had a lookout forward and a lookout aft, and a man ringing the bell, all which, of course, due vigilance would have required her to have. But it is proved by the evidence of Santos, the man who claims to have been at the bell (and he is not contradicted) that there was no one on the forecastle deck at all after 2 o'clock. In fact no orders were given to station a lookout forward. Cote, (fol. 592).

This was beyond question a lack of the vigilance which the circumstances of the case required. Nor can it be successfully claimed that this was a negligence which did not contribute to the collision. It is manifest that a man on the forecastle deck, engaged solely in looking out, should have, and in all probability would have, heard the whistles of the *Bourgogne* as she approached, as Russell did hear them, (Russell, fol. 1184, and see Murphy, fol. 1546), and would have warned the officer

on the bridge, so that he would have known that a steamer was approaching long before she appeared through the fog. As a matter of course, if that had been the fact, his attention would have been specially called to the bell, and he would have made sure that the proper signal, by the ringing of the bell, was in fact being given; and there would be in the case no such question as to whether or not the bell was actually rung, as is now found there.

ELEVENTH POINT.

The Ailsa was also in fault in that her bell was not ringing during the near approach of the Bourgogne.

No doubt there are several witnesses from the *Ailsa* who testify generally that the bell of the *Ailsa* was rung, from the time of the anchorage of the *Ailsa* till the collision, at very short intervals. But it is to be noticed that the exact question in issue in this case is whether the bell was rung during the four or five minutes before the *Ailsa* was sighted from the *Bourgogne*. And no witness from the *Ailsa* is able to speak specifically of that time, because no one of them was aware of the approach of the *Bourgogne* until she came in sight. In fact, therefore, this question must depend mainly upon the weight to be given to the testimony of the man who is claimed to have been at the bell, and of the officer who is claimed to have been upon the bridge during this particular time. And, as to both these witnesses, there is a discrepancy in the testimony of the *Ailsa* which casts suspicion upon their evidence.

(*a.*) It is to be noted that, if there were in fact lack of attention on board of the *Ailsa*, that would account both for the fact that the bell was not rung, as we claim, which is contested, and for the fact that the

whistles of the *Bourgogne* were not heard, which is not contested.

But this fact, that no whistle was heard by any one on the *Ailsa* who was charged with the duty of vigilance, calls for explanation from her. None is furnished. It is suggested by counsel for the *Ailsa* that the whistles were heard, but were not distinguished from other whistles in that locality. But the evidence will not admit of that explanation.

It is only claimed that there were two men on the *Ailsa* charged with any vigilance, the man at the bell and the officer on the bridge. Whether this officer was the first mate, Cote, or the second mate, Nelson, is disputed between them.

Cote says that Nelson was away from the bridge for the ten minutes before the collision, which would cover the time in question. He says: "After ten minutes were over he (Nelson) came and relieved me again and I went down on the lower bridge. As I went down on the lower bridge I saw the bow of a steamer coming for us" (fols. 554, 608).

There is great confusion in Nelson's evidence on this point. He says the chief mate relieved him before 2, so that he was back again on the bridge by a quarter before two (fol. 685), (which would put him on the bridge twenty-five minutes before the collision), and yet he says he is under the impression that he resumed his place on the bridge between 5 and 10 minutes before the collision (fols. 686–7.) He says that he turned the men to at 2 o'clock, and that was both after and before the first mate relieved him (fol. 690.)

Cote's evidence is the best on this point. Nelson's evidence would leave Cote unaccounted for, for from 10 to 25 minutes before the collision. Cote's evidence accounts for him and puts him on the lower bridge when the *Bourgogne* came in sight. He himself says he was there, and that he "made a motion to call the captain, who was in the chart room, but that the pilot got in before me" (fol. 559.)

But whether it were Nelson or Cote who was on the

bridge at this time makes little difference, for each of them testifies that he heard no whistles.

The evidence of these men is positive that they heard no whistle of the *Bourgogne* at all, and so is that of the men who are claimed to have rung the bell.

COTE, (fol. 555.)

During that time (from the time we anchored till I saw her), I heard some bells astern, and I think bells on the port side and whistles. There was whistles nearly all round—vessels moving about. * * * I heard a number of whistles passing while we were at anchor.

(fol. 609.)

When I saw her bow, that was the first I saw of her or heard of her.

(fol. 636.)

I could not tell if whistles of passing steamers were on tow boats or larger vessels.

NELSON, (fol. 649.)

I heard bells of vessels that were at anchor on my port bow, and I heard steam whistles, two that were coming from steamers, which passed us, one on each side. (See also fol. 678.)

(fols. 678, 680.)

I did not hear any whistles from the *Bourgogne*—none right ahead.

(fol. 652):

The first I saw or heard of the *Bourgogne*, I saw something red appearing out of the fog close ahead.

VITOLANE (fol. 902):

While I was ringing the bell I heard no sound or signal, whistle or bell. I didn't hear anything.

SANTOS (fol. 908):

I didn't hear anything.

The explanation offered by the *Ailsa's* counsel (Brief, p. 44), viz.: that the whistles were heard, but were not distinguished from other whistles, is therefore

contrary to the evidence of all these men. And there is no other explanation of the fact than that either some state of the atmosphere prevented the whistles from being heard, or else there was a lack of attention on the part of those charged with the care of the *Ailsa*. And if there was such lack of vigilance in listening for the approach of vessels in such a dense fog, there may well have been the same lack of vigilance in the giving of notice by the bell.

(*b.*) If the attention of a man on the forecastle head, or the attention of the officer on the bridge had been called to the approach of the *Bourgogne*, by hearing her whistle, as Russell did (fol. 1184) several times, coming nearer and directly for the *Ailsa*, his attention would at once have been called to the question whether the bell was *then* being rung as it should be; and he would have been able to have testified, if such had been the fact, that the question of the bell was *then* presented to his mind by his hearing the approaching whistle, and that he *then* saw the man at the bell and heard it rung repeatedly while the whistle was approaching. But no such evidence is furnished by any witness. They all testify generally that the bell was rung at short intervals from the time the *Ailsa* anchored till the collision. But no one can say that his attention was specially called to the matter at the critical time.

That is just one of the circumstances in which the presence of a special lookout is to be desired. And the absence of a lookout, who could give evidence on such a point, has been in some cases especially commented on by the courts.

(*c.*) The evidence as to the man at the bell is quite conflicting.

Cote says first (fol. 551): "Everybody was at their station then. The second officer was on the upper bridge, one man at the bell, and the other two men were busy about the deck."

On cross-examination he says (fol. 585) that he left

Smith on the forecastle deck, and stationed (Cellentali) Vitolani at the bell, and that (fol. 589) he saw neither of them after that till the collision, though he thought the men were changed afterwards, when he was not on deck, by the second officer (fol. 595); and he did not see the men of the other watch at all (fol. 601).

And he says that Vitolani belonged to the starboard watch, and remained at the bell (fol. 603), while Nelson says the starboard watch went to dinner first (fol. 681).

But Smith testifies that he was not on the forecastle, but at the bell, from the time they anchored till the watch was changed, at 2 o'clock, when Vitolani, who was in the other watch, took the bell, and he (Smith) went below and stayed till the collision (fols. 832, 834, 837).

Vitolani says he took the bell at 2 o'olock and was ringing it for between 15 and 25 minutes (fols. 886-8) when Santos relieved him about 5 or six minutes before the collision (fol. 889); and again he says he was ringing the bell for 20 or 25 minutes (fol. 902); while Santos says that Vitolani rang the bell "it might be five, might be seven, might be ten minutes" (fol. 907), and he himself continued to ring it about 10 or 12 minutes" (fol. 909).

As the collision happened at 10 minutes past two, as Nelson, the second officer, says (fol. 688), or as the pilot Shook says, at 2.14.30, it is manifest that neither could Vitolani have rung it as he says he did, nor could he and Santos have rung it as Santos says they did. And it is utterly contrary to the routine of ship's duty, that a man set at 2 o'clock to ring the bell should have been relieved by another five or even ten minutes after without any order from any one.

Nelson, the second officer, tells a different story. In fact, he tells several different stories. He first said that from the time he went on the upper bridge till the collision there was a man ringing the bell who was a stranger who had just come (fol. 643).

Then he says he knew all three of the men in the starboard watch who came on deck at 2, and he gives their names (fol. 681).

Then he says that he sung out to the man to "keep that bell going there" (fol. 692), but he did not know who the man was to whom he sung out because he was a stranger, and Smith was on the forecastle (fol. 693); while Smith says he himself "went to ring the bell just as quick as the anchor dropped" (fol. 832) and stayed there till 2 o'clock and then went below (fol. 837).

Then Nelson says that when the watch was changed at 2 o'clock, "first of all Pasquale Vitolani came out to the bell and he was there perhaps half a minute, and then Santos took his place" (fol. 697).

> It is to be noted that Vitolani and Santos were examined on March 6th, only six days after the collision, so that there was little lapse of time to affect their memories and to have caused such remarkable discrepancies.

(*d.*) Murphy says that he heard the bell ringing part of the time, and part of the time he did not hear it, and he adds that, "it may have been ringing" (fol. 1544). But he also says that, though he did not go forward, yet as far as he could see there was no one around there, and that he heard the chief officer shout in a loud voice to some of the men just about the time of the collision to keep that bell ringing (fols. 1548–9).

In considering the question as to the ringing of the bell, it is certainly a very curious circumstance that the second officer and the first officer also should have felt called upon to shout to the men forward to keep the bell going.

Now, when we put together with this fact the contradictions in the evidence, this alleged change of the man at the bell without reason between 2 and 2.10 P. M.; the impossibility of the evidence of the two men as to the time of their ringing the bell; the change of the officer on the upper bridge, and the

contradiction between those two officers as to the time of the change; the evidence of Russell and P. Murphy, as to their not hearing the bell, or seeing any one forward; and couple with these facts the fact that none of the *Bourgogne's* whistles were heard by either the officer claimed to have been on the bridge at that time, or the man claimed to have been at the bell (which is utterly inexplicable if proper vigilance was exerted), it seems easy to draw the conclusion that the fact that no bell was heard by any one of the 16 men on the *Bourgogne*, who were intent on hearing just such sounds, is to be accounted for by the conclusion that the bell was not rung for five or ten minutes before the *Bourgogne* came in sight, but that when her approach was seen, the man, who ought to have been ringing it before, began to ring.

In the case of *The Sam Weller* (5 Ben., 293), which was a question of lights, the Court said: "Clear evidence that a careful lookout, watching for lights, could not see a vessel approaching till upon him, and that then he saw her without lights, is certainly strong affirmative evidence that no light was then burning on the approaching vessel."

So in this case the evidence of sixteen witnesses, watching for bells, that they heard no bell from a vessel which they were approaching, till they were upon her, and that then they saw her without hearing a bell, is certainly strong affirmative evidence that no bell was being rung on the vessel for some minutes before she was seen.

On such a question mere numbers of witnesses must be sometimes considered. So in the case of *The Dale* (46 F. R., 670) where the libellant's witnesses were two to one in opposition, the Court accepted the story of the two.

See *The Circassia*, 55 F. R., 116.
Affirmed on Appeal, 73 F. R., 878.
La Champagne, 60 F. R., 303.

The evidence of the sixteen witnesses from the *Bourgogne* so far overpowers that of the witnesses from the

Ailsa, that the Court is called upon to believe either that the bell of the *Ailsa* was not rung during the four or five minutes before the *Ailsa* was seen, or that, if it was rung, there was something in the atmosphere or the position of the bell, which prevented its being heard. In either case, the *Bourgogne* is to be exonerated. If the Court shall on the evidence conclude that the bell was not rung at that special time, the *Ailsa* must be held in fault.

TWELFTH POINT.

The "Ailsa" was in fault in not slipping her chain.

The District Judge held the *Ailsa* in fault because her anchor chain was not allowed to run when the approach of the *Bourgogne* became visible (fol. 1853).

The *Ailsa's* counsel claims that it would have taken so much time to do this that it would have been of no use.

He apparently overlooked the evidence of the mate of the *Ailsa* that to do that would be "a couple of seconds' work" (Cote, fol. 584).

The case of *The Meanatchy* is no authority for the appellants on this point or any other. The *Meanatchy* was anchored in a proper place, and showed a proper light. The *Mary* undertook to cross ahead of her, between her and another vessel at anchor. The Court excused *The Meanatchy* from not having slackened her chain, because she could not tell, till a very late moment, whether the *Mary* would try to go ahead or astern of her.

But here, if the repeated whistles of the *Bourgogne* had been heard approaching, as they should have been with proper attention, there could have been no doubt, because she was approaching head and head. If any man had been on the forecastle there was abundance of time to have loosed the chain and let the *Ailsa*

drift, after the near approach of the *Bourgogne* from dead ahead was discovered.

THIRTEENTH POINT.

Erroneous statements in the Appellants' brief should be corrected.

It seems proper, even at the risk of lengthening this brief, to point out some erroneous statements in the briefs of the appellants:

(1.) The counsel for the *Ailsa* states twice (pp. 10 & 29) that the question of anchoring between Capt. Poirot and the pilot was raised abreast of Clifton and *above Quarantine*. But there is no question but that it was, as the District Judge remarked, about a quarter of a mile *below* Quarantine (see above p. 16).

(2.) Counsel says that there was no drift of the *Bourgogne* with the tide while straightening on her course from her pier, because, he says, "if there had been such a drift some of the many witnesses called would have noticed it and testified to it. The natural inference is that the witnesses did not testify to it, *because the fact did not exist.*" But, when it appears that no witness whatever was asked by counsel on either side in reference to it, the natural inference is that the witnesses did not testify to it *because they were not asked*. Counsel adds, "every one who has watched a steamer backing out from her pier knows that this is the usual course," *i. e.*, not to drift down with an ebb tide. The contrary is the fact. If it were to be claimed that the tide had no effect to carry the *Bourgogne* down stream, it was certainly incumbent on the appellants to give some evidence in support of such an extraordinary phenomenon.

(3.) The counsel says, "one reason why it was difficult to anchor when she reached the red buoy was the great speed of the *Bourgogne*." But there is not a

particle of evidence that there was any difficulty in anchoring near the red buoy. There was abundant reason for not anchoring there because her navigators could see two miles ahead at that time.

(4.) The brief says (p. 17) that "Fort Lafayette had become invisible, and this ought to have warned the *Bourgogne* not to attempt that narrow channel." But, although Fort Lafayette had become invisible, the red houses on the dock above it were not invisible, and the localities, therefore, were plainly to be seen. Moreover, the counsel's argument that the *Bourgogne* ought not "to attempt that narrow channel," is an unconscious admission that the *Ailsa* was anchored in the channel, as we claim she was.

(5.) Counsel states as a fact that the regulations with reference to the anchorage grounds "are made for ordinary cases, and point out where vessels may lie for weeks, if they choose, taking on or waiting for a cargo." This is a statement without a particle of proof and contrary to the wording of the rules themselves. The rules say "*any* vessel."

(6.) Counsel says that "it is a well settled rule that it is the duty of a vessel to anchor at once when unexpectedly beset with fog, even though in the channel." Not only is there no such well settled rule, but there is no case cited by the appellants which holds any such rule.

(7.) The counsel says (p. 22) that in the case of The *H. F. Dimock* the District Judge held that the *Alva* was not to blame for anchoring in a dense fog in Pollock Rip Slue. But in that case there was no regulation as to anchorage ground, and the District Judge found that the *Alva* was anchored "where vessels were accustomed to anchor, and out of the line of the usual course of vessels passing through the Slue in either direction."

(8.) The brief says (p. 23) that "there is positive, uncontradicted testimony from unimpeached witnesses

that they heard bells ahead of the *Ailsa* before she anchored." But the fact, proved without contradiction, that the only vessels which were at anchor within a mile south of the place where the *Ailsa* anchored were the *Bourgogne* and the *Werra*, both of which came down after the *Ailsa* anchored, is sufficient to contradict and impeach those witnesses.

(9.) The brief says that "there is a fallacy in the assumption that it is possible in a dense fog to tell just where the anchorage line is." All that was necessary in this case for the pilot of the *Ailsa* to determine where the anchorage line was, if he knew what it was, which he did not (fols. 320–1), was a compass and his own ears. If he had taken the *Ailsa* to where the bell on Fort Lafayette was north by west of him, instead of north or north by east, he would have known that he was east of the anchorage line. The pilot of the *Bourgogne* knew this and proposed to act accordingly (fol. 1219).

(10.) The brief says (page 27) that "The pilot of the *Ailsa* is of the opinion that the *Ailsa* was anchored on anchorage ground." But the pilot expressly refused to testify that he was of that opinion. All that he would say was that he was on the eastern side of the channel, and could not say whether he was on the inside of the line or on the line.

(11.) The counsel says that, although Capt. Morris and Cote think that the distance from the windlass to the water was from four to five fathoms, "actual measurement shows it to have been seven fathoms" (Brief, p. 28). What Capt. Morris said was that from the water to the windlass there would be "about three or four fathoms." And what Cote said was that it would be "four fathoms or thereabouts"—"eleven fathoms to the water and the fifteen-fathom shackle on deck."

The District Judge, in his opinion, referring to the testimony as to the measurement says: "I understand this testimony to refer to some measurement of

the plans of the ship. I am unable to verify it" (fol. 1848); while the *Ailsa's* counsel says that "the accuracy of the measurement can be tested by anybody with a rule and dividers, and when tested its accuracy is manifest." If the District Judge was unable to verify it by actual measurement of the plan, we do not think the counsel for the appellants are able to. We are not able to verify it ourselves. According to the best measurement that we have been able to make, the distance from the windlass to the water's edge was not more than twenty feet, which would agree with Capt. Morris' testimony. And it is very manifest that the evidence of the captain of the ship is a great deal more likely to be correct than the evidence of an outsider as to a measurement for which he gives no data, and which is based only upon a plan.

(12.) The brief says (p. 31) that "the shorter the distance between the place where the *Ailsa* sank and the place where she lay at anchor, the farther she must have been from the anchorage line." But this is an impossibility. She made easting continually till she sank. The farther the distance, the farther to the west she must have been.

(13.) The brief, to excuse the *Ailsa* for not having let her chain run, says she could not tell whether the *Bourgogne* was trying to pass under her stern. As the *Ailsa* was lying at anchor she was heading north by west. As the *Bourgogne* was coming she was coming in exactly the opposite direction, south by east. The idea of her going under the stern of the *Ailsa* would have been an utterly impossible one.

(14.) The counsel says (p. 44) that the whistles were heard by the pilot, but in the multiplicity of signals were not recognized as those of the *Bourgogne*.

The pilot says (p. 62)

> Q. Had you heard any whistles from the *Bourgogne* before you saw her? A. I heard a whistle to the north, but I could not distinctly say whether it was the *Bourgogne's* whistle, or what it was.

The *Bourgogne* was approaching the *Ailsa* head on, blowing her whistle, as she claims, once every 40 seconds; as the counsel for the appellants claim, blowing it too frequently. And yet all that the pilot of the *Ailsa* can say is that he heard a whistle but could not distinctly say whether it was a whistle from a vessel which was approaching. Manifestly in that situation, unless there was something in the atmosphere to prevent the whistle being heard, any man *paying attention to the requirements of the situation* would have heard a whistle directly ahead repeated several times until the vessel from which it came appeared in sight; and there could not have been any doubt as to the vessel which was blowing the whistle.

FOURTEENTH POINT.

So far as the Bourgogne is concerned the collision was due to inevitable accident.

See The *Morning Light*, 2 Wall., 550–561.
The *Schwan*, 7 Asp., 347.
The *Rebecca Shepard*, 32 F. R., 926.

The law of inevitable accident may be found laid down by the Supreme Court of the United States in the case of *The Morning Light*, 2 Wall., 550–561.

The definition of inevitable accident, as applied in that case to a collision at night (and the same rule would seem to apply to a case of fog) is this: "An occurrence which the party charged could not possibly prevent by the exercise of ordinary care, caution and maritime skill."

Under this rule the *Bourgogne* must surely be discharged from liability. As to her speed, she was certainly being navigated with more than ordinary care and caution. If she was to move at all she could not have moved more carefully. As to her lookout no one can claim that ordinary care and caution called for

the presence of more than sixteen men all attentive to the duty of looking and listening, or that the extraordinary measure of having a man at the crow's nest, was required any more than that of having a man at the masthead, for there is no evidence to show that either of these things was usual or would have afforded any advantage for a lookout; on the contrary the evidence is that it would not.

And that "ordinary care, caution and maritime skill"' would have called upon her to anchor when she could see nearly two miles ahead, or to anchor in the channel contrary to the Regulations when the fog shut down thick about her, is a proposition which has no reason to sustain it. On the contrary, her course is proved to have been conformable to "ordinary care, caution and maritime skill" by the fact that it was the course taken by six pilots, including the pilot of the *Ailsa*, under the same circumstances.

As far as the *Bourgogne* is concerned, therefore, the collision must be held to have been inevitable, and she is entitled to decrees affirming the decree of the Court below with costs.

EUSTIS, JONES & GOVIN,
Proctors for *La Bourgogne*.

ROBERT D. BENEDICT,
EDWARD K. JONES,
Advocates.

NOV 7 1898
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1898.

In the Matter

OF

The Petition of the ATLAS STEAMSHIP COMPANY for a Writ of *Certiorari* to the U. S. Circuit Court of Appeals for the Second Circuit.

Affidavit in opposition to application for Writ of Certiorari.

2

UNITED STATES OF AMERICA,
Southern District of New York. } ss.:

EDWARD K. JONES, being duly sworn, deposes and says:

That he is a member of the law firm of Eustis, Jones & Govin, the proctors for La Compagnie Generale Transatlantique, the owners of the Steamship *La Bourgogne*, in the case in which the above-entitled application for a writ of *certiorari* is made. 3

And deponent further deposes and says that the suit of the Atlas Steamship Company against the said steamship *La Bourgogne* is but one of fourteen distinct litigations growing out of the collision referred to in the petition, although nominally there were but three causes, to wit: the case of the Atlas Steamship Company, the case of Charles B. Wheeler, and the case of the Western Assurance Company of Toronto and others. In the last mentioned cause there were twelve distinct litigants, all joined as co-libellants, which as above stated, makes fourteen distinct litigations in all. 4

5 And deponent further deposes and says that the said causes were decided and disposed of by the U. S. Circuit Court of Appeals for the Second Circuit in the month of March, 1898, and subsequently in the month of April, 1898, mandates were duly issued to the District Court from which said causes were brought by appeal affirming the judgment of the said District Court in the said causes and directing the entry of decrees dismissing the libels in each case. Decrees were accordingly entered in the case of Wheeler
6 and in the case of the Western Assurance Company of Toronto and others, which were thereafter duly satisfied, and thus finally disposed of.

And deponent further deposes and says that in the early part of July last the disastrous collision between the *Bourgogne* and the *Cromartyshire* occurred, resulting in the loss of the *Bourgogne* and great loss of life, and that fact is mentioned by the petitioner in this case in its petition for the writ of *certiorari* presumably as one reason why the application
7 should be granted, and accordingly some time after the said disaster, namely, in the month of August last, this petition was filed.

And deponent further deposes and says that the larger interests in the whole case, which exceed by far a majority in value of this litigation as a whole, to wit, the interests represented by the Western Assurance Company of Toronto and others are satisfied with and have signified their willingness to abide by the decree of the Circuit Court of Appeals, no appli-
8 cation for a writ of *certiorari* being made in that behalf.

EDWARD K. JONES.

Sworn to and subscribed before me
this 5th day of November, 1898.

FREDERICK KOPF,
[L. S.] Notary Public (74),
N. Y. Co.

WINSTON *v.* UNITED STATES.

STRATHER *v.* UNITED STATES.

SMITH *v.* UNITED STATES.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Nos. 431, 432, 433. Argued November 28, 1898. — Decided January 3, 1899.

Under the act of Congress of January 15, 1897, c. 29, § 1, by which "in all cases where the accused is found guilty of the crime of murder," "the jury may qualify their verdict by adding thereto 'without capital punishment,' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life," the authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of opinion that there are palliating or mitigating circum-

Statement of the Case.

stances; but it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment.

THESE were three cases of indictments, returned and tried in the Supreme Court of the District of Columbia, for murders committed since the passage of the act of Congress of January 15, 1897, c. 29, by the first section of which, "in all cases where the accused is found guilty of the crime of murder or of rape under sections fifty-three hundred and thirty-nine or fifty-three hundred and forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life." 29 Stat. 487.

Winston was indicted for the murder of his wife by shooting her with a pistol on December 13, 1897. At the trial, the government introduced testimony that while the defendant and his wife were together in their bedroom about noon, with the door fastened, a pistol shot was heard, followed by a loud cry from her, and by two or three other pistol shots; that, on breaking open the door, the wife was found lying on the bed, killed by a pistol ball in the brain, and the defendant lying near her, unconscious, badly wounded by a pistol ball in the side of the head, and with a pistol near his hand; that earlier in the day he had taken a pistol from a place where he had left it; that he had previously threatened to kill her; and that he afterwards confessed that he had killed her, and said that he had shot her because he was jealous of her and another man, and wanted to shoot both her and her lover, and that he afterwards shot himself. The defendant, being called as a witness in his own behalf, testified that he and his wife lived happily together, except that she was jealous of him; that he did not shoot her, and never said that he had shot her; that she shot him, and he immediately became unconscious, and so remained for a week after.

The judge instructed the jury that if they believed from the evidence that the woman took her own life, or that the

defendant did not fire the fatal shot, their verdict must be not guilty; but that if they were satisfied beyond a reasonable doubt that she met her death from a pistol ball fired from a pistol held in the hand of the defendant, and that her death was caused by him, their verdict should be "guilty as indicted," "for there would be a presumption of malice arising from the fact that her death was accomplished by the firing of a pistol ball by the defendant from a pistol held in his hand; and as there is no evidence that has been adduced which tends to show any palliating or mitigating circumstances, there could be but one reasonable inference from the fact of the shooting, and that would be that the act was committed with malice aforethought."

The judge further instructed the jury as follows: "You have been told, and it is the law since the act of Congress, passed in January, 1897, that a jury is authorized, when they shall have reached the conclusion that a defendant on trial is guilty of murder, to qualify their verdict by adding thereto the words 'without capital punishment.'

"Counsel has endeavored to impress upon the jury the fact not only that this right exists, but that it is the duty of the jury to so qualify their verdict in every given case; that because they have the opportunity of extending mercy, therefore the duty follows the right; that because it is your privilege or opportunity to qualify the verdict by adding the words 'without capital punishment,' it is your duty so to do. But the law was not so intended. It was intended to serve some useful purpose. There are many shades of circumstances that make up the crime of murder in different cases. In some instances, the circumstances might be such as to bring the crime within the definition of murder, and yet those circumstances might not indicate that degree of wantonness, wilfulness and heinousness that the circumstances in other cases would indicate. I think that it was intended by Congress that in cases where the crime is clearly murder within the definition of the crime of murder, and yet there are circumstances which tend to mitigate the offence, palliating circumstances that tend to show that the crime is not heinous in its

character, the jury may add the words 'without capital punishment,' and the law then makes the penalty imprisonment for life.

"That qualification cannot be added unless it be the unanimous conclusion of the twelve men constituting the jury. I think that it should not be added unless it be in cases that commend themselves to the good judgment of the jury, cases that have palliating circumstances which would seem to justify and require it.

"The penalty for the crime of murder has not been abrogated by Congress. The law-making power has seen fit to allow that penalty to remain; and it is only in those cases where the circumstances indicate to the jury that propriety, and the necessity, perhaps, or the duty of making such qualification, that the jury should add the qualifying words 'without capital punishment.' In all other cases the law speaks. The jury need not qualify the penalty. It is not their duty to qualify it. It is their right and privilege in a proper case to qualify it."

"If the defendant did not commit this crime, he should be returned by your verdict not guilty. If he did commit the crime, then he is responsible for these conditions, not you. Your simple duty is to declare whether he is guilty or not guilty. If guilty, then your verdict should be either guilty as indicted, or guilty with the qualification."

Strather was indicted for the murder with a hatchet on October 15, 1897, of a woman with whom he lived as his wife, but who was the wife of another man. At the trial, the government introduced evidence tending to prove these facts, and that for several nights before the homicide she failed to join the defendant, and he threatened to kill her. The testimony of the defendant and of other witnesses called by him tended to prove the defendant's previous reputation as a peaceful and law-abiding citizen, and the deceased's previous reputation as a quarrelsome and violent woman; that she had on previous occasions assaulted him, on one occasion throwing at him a beer mug, and on another occasion cutting him with a

penknife; that she had previously threatened his life, and he knew of the threat; that immediately before the homicide, there had been a quarrel between them; and that upon his arrest, immediately after the homicide, there was a bleeding wound upon his face. The defendant, in his testimony, admitted that he inflicted upon the woman the wounds which caused her death; but denied that he had ever threatened her life; and affirmed that he inflicted those wounds while under fear of his life, and during the heat and excitement of the quarrel, and while suffering pain from a blow by her on his left jaw, where there was an ulcerated sore at the time he received the blow.

At the close of the evidence, the defendant requested the judge to give certain instructions to the jury, including this one: "In case the jury find the prisoner guilty of murder, they are instructed that they may qualify their verdict by the words 'without capital punishment,' no matter what the evidence may be." The judge declined to give that instruction, and, after defining murder and manslaughter, and the right of self-defence, instructed the jury as follows:

"If you should reach the conclusion that your verdict should be 'guilty as indicted,' it is your right, under a recent act of Congress, passed in January, 1897, to add to this verdict 'without capital punishment.' The jury have this power in any given case. The court cannot control your act at all. The court can only advise you as to the law. The responsibility is entirely with you, and you can render such verdict as you please. I mean that you have the power to do it. You can render a verdict of not guilty in a case where the evidence clearly shows guilt. Of course, such action on the part of the jury would be a direct violation of their oaths. If the jury believed a man was guilty, and simply out of pity or sympathy or mercy rendered a verdict of not guilty, they would violate their oaths.

"I have no doubt that this act of Congress was intended to serve some useful purpose. The penalty of murder has not been disturbed by this act of Congress; it is fixed by law; the jury neither make nor unmake it. Doubtless the intention

of the legislature was this: that if, in a case in which the jury reach the conclusion that the party on trial is guilty for murder, circumstances are shown by the evidence that are of a palliating nature, they may give the defendant the benefit of those palliating circumstances, and say in their verdict 'without capital punishment.' If, however, the jury believe that there are no palliating circumstances, it is their duty not to add anything, but to leave the penalty as it stands. It may be that a provision of this kind in the law was intended to apply to a case somewhat like that suggested by the district attorney. Suppose a man knowing that his wife had been in improper relations with another man, and roused to anger by such knowledge, but postponing from time to time, while he meets this man, the execution of his vengeance upon him, he finally concludes to and does kill him, that would be murder, a clear case of murder under the law; but those circumstances might be such as would convince the jury that the extreme penalty of the law ought not to be inflicted. There may be other cases. I simply give that as an illustration. But the object of this penalty, gentlemen of the jury, is to protect society; and the jury should not interfere with it under any circumstances, unless the circumstances are such as to satisfy them that this provision should be added to the verdict.

"If you reach the conclusion of guilt, 'guilty as indicted,' it is your duty to return that verdict; and, unless you unanimously agree that the verdict should be qualified as the statute provides you may qualify it, there can be no qualification. It must be the unanimous conclusion of the jury. The question for you to ask yourselves is this: Are the circumstances in this case such, if you reach the conclusion that the defendant is guilty as indicted, as to require you, upon your oaths, to interfere with the penalty fixed by law?"

Smith was indicted for the murder with a hatchet on November 15, 1897, of the wife of another man. At the trial, the government introduced circumstantial evidence tending to support the indictment; and also evidence that the defendant hired a room in the dwelling-house of the husband and wife;

that, some time before the homicide, the two men had a quarrel about her, and both were arrested, convicted and imprisoned on charges of assault; that the defendant at one time threatened to kill her if she ever resumed living with her husband; and that the defendant was quarrelling with her just before her death.

The judge instructed the jury as follows: "Under a recent statute the jury are authorized, in returning a verdict of guilty of murder, if the evidence justifies them on their consciences in so doing, to qualify the verdict by the addition of the words 'without capital punishment.'

"The law inflicting the penalty of death for murder has not been repealed. That is the penalty which the law fixes." "The legislature probably intended that in cases where there were some mitigating or palliating circumstances, where it was apparent from the evidence that the crime was not the most heinous crime of murder, or where there was doubt whether the circumstances indicated premeditation, perhaps, that the jury might qualify their verdict by adding the words 'without capital punishment.' But it was evidently contemplated by Congress that there would be cases in which juries would not be justified in so qualifying their verdicts, and therefore the law remains, and unless the verdict is so qualified the penalty of the law is unchanged."

"If you find that the defendant is guilty, you will vindicate the law and uphold it by returning a verdict of 'guilty as indicted.' Whether you qualify it or not is a matter for you to determine. If you conclude to qualify it, it must be by the unanimous decision of the twelve jurors."

In each case, the defendant excepted to the instructions of the court concerning the act of Congress of January 15, 1897; and, after verdict of "guilty as indicted," and sentence of death, appealed to the Court of Appeals of the District of Columbia, which affirmed the judgment, Justice Shepard dissenting. 26 Wash. Law Rep. 469. Writs of certiorari were thereupon granted by this court under the act of Congress of March 3, 1897, c. 390. 29 Stat. 692; 171 U. S. 690.

Mr. George Kearney for Winston. *Mr. Charles H. Turner* was on his brief.

Mr. Samuel D. Truitt for Strather. *Mr. Tracy L. Jeffords* was on his brief.

Mr. Henry E. Davis for the United States. *Mr. Assistant Attorney General Boyd* was on his brief.

Mr. F. S. Key Smith for Smith.

Mr. Justice Gray, after stating the cases, delivered the opinion of the court.

By section 5339 of the Revised Statutes, reënacting earlier acts of Congress, "every person who commits murder" "within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States," "shall suffer death."

The act of January 15, 1897, c. 29, entitled "An act to reduce the cases in which the penalty of death may be inflicted," provides, in section 1, that in all cases in which the accused is found guilty of the crime of murder under section 5339 of the Revised Statutes "the jury may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life." 29 Stat. 487.

The question presented and argued in each of the three cases now before the court is of the construction and effect of this act of Congress.

The hardship of punishing with death every crime coming within the definition of murder at common law, and the reluctance of jurors to concur in a capital conviction, have induced American legislatures, in modern times, to allow some cases of murder to be punished by imprisonment, instead of by death. That end has been generally attained in one of two ways.

First. In some States and Territories, statutes have been passed establishing degrees of the crime of murder, requiring

the degree of murder to be found by the jury, and providing that the courts shall pass sentence of death in those cases only in which the jury return a verdict of guilty of murder in the first degree, and sentence of imprisonment when the verdict is guilty of murder in the lesser degree. See *Hopt* v. *Utah*, 104 U. S. 631, and 110 U. S. 574; *Davis* v. *Utah*, 151 U. S. 262, 267–269.

For instance, the statutes of the Territory of Utah contained the following provisions: "Every murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any other human being, other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evincing a depraved mind regardless of human life, is murder in the first degree; and any other homicide, committed under such circumstances as would have constituted murder at common law, is murder in the second degree." "Every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the court; and every person guilty of murder in the second degree shall be imprisoned at hard labor in the penitentiary for not less than five nor more than fifteen years." Compiled Laws of Utah of 1876, §§ 1919, 1920, pp. 585, 586.

In the leading case of *Hopt* v. *Utah*, this court held that evidence that the accused was in a state of voluntary intoxication at the time of the killing, (which would not have been competent in defence of an indictment for murder at common law,) was competent for the consideration of the jury upon the question whether he was in such a condition as to be capable of deliberate premeditation, constituting murder in the first degree under the statute. 104 U. S. 631. Upon a second trial of the same case, the territorial court, in charging the jury, having used this language, "That an atrocious and dastardly murder has been committed by some person is

apparent, but in your deliberations you should be careful not to be influenced by any feeling," the conviction was again reversed by this court, saying that this observation was naturally regarded by the jury as an instruction that the offence, by whomsoever committed, was murder in the first degree; whereas it was for the jury, having been informed as to what was murder, by the laws of Utah, to say whether the facts made a case of murder in the first degree or murder in the second degree. 110 U. S. 582. And in *Calton* v. *Utah*, 130 U. S. 83, a sentence of death upon a conviction of murder in the first degree was reversed, because the judge had not called the attention of the jury to their right, under the statute, to recommend imprisonment for life at hard labor in the penitentiary in place of the punishment of death; and without a recommendation of the jury to that effect the court could impose no other punishment than death. While those decisions have no direct bearing upon the question now in judgment, they are important as illustrating the steadfastness with which the full and free exercise by the jury of powers newly conferred upon them by statute in this matter has been upheld and guarded by this court as against the possible effect of any restriction or omission in the rulings and instructions of the judge presiding at the trial.

Second. The difficulty of laying down exact and satisfactory definitions of degrees in the crime of murder, applicable to all possible circumstances, has led other legislatures to prefer the more simple and flexible rule of conferring upon the jury, in every case of murder, the right of deciding whether it shall be punished by death or by imprisonment. This method has been followed by Congress in the act of 1897.

The act of Congress confers this right upon the jury in broad and unlimited terms, by enacting that "in all cases in which the accused is found guilty of the crime of murder," "the jury may qualify their verdict by adding thereto 'without capital punishment,'" and that "whenever the jury shall return a verdict qualified as aforesaid" the sentence shall be to imprisonment at hard labor for life.

The right to qualify a verdict of guilty, by adding the words

"without capital punishment," is thus conferred upon the jury in all cases of murder. The act does not itself prescribe, nor authorize the court to prescribe, any rule defining or circumscribing the exercise of this right; but commits the whole matter of its exercise to the judgment and the consciences of the jury. The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment. How far considerations of age, sex, ignorance, illness or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone.

The decisions in the highest courts of the several States under similar statutes are not entirely harmonious, but the general current of opinion appears to be in accord with our conclusion. *State* v. *Shields*, 11 La. Ann. 395; *State* v. *Melvin*, 11 La. Ann. 535; *Hill* v. *State*, 72 Georgia, 131; *Cyrus* v. *State*, 102 Georgia, 616; *Walton* v. *State*, 57 Mississippi, 533; *Spain* v. *State*, 59 Mississippi, 19; *People* v. *Bawden*, 90 California, 195; *People* v. *Kamaunu*, 110 California, 609.

The instructions of the judge to the jury, in each of the three cases now before this court, clearly gave the jury to understand that the act of Congress did not intend or authorize the jury to qualify their verdict by the addition of the words "without capital punishment," unless mitigating or palliating circumstances were proved.

This court is of opinion that these instructions were erroneous in matter of law, as undertaking to control the discretionary power vested by Congress in the jury, and as attributing to Congress an intention unwarranted either by the express

words or by the apparent purpose of the statute; and therefore in each of these cases

Judgment must be reversed, and the case remanded to the Court of Appeals with directions to reverse the judgment of the Supreme Court of the District of Columbia, and to order a new trial.

MR. JUSTICE BREWER and MR. JUSTICE MCKENNA dissented.